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ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1997 by state appellate courts and federal courts are summarized and analyzed in this book. The analyses, each written by one or more experts in educational law, are divided into nine topical chapters: (1) employees; (2) school governance at the state and local levels; (3) pupils; (4) bargaining between schools and employee unions; (5) students with disabilities; (6) torts, or laws offered to remedy individuals for harm caused by the unreasonable conduct of others; (7) sports; (8) higher education; and (9) students in higher education. The book contains a 12-page alphabetical listing of cases cited in the text as well as a 5-page index. (JMD)

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THE YEARBOOK OF EDUCATION LAW 1998

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CHARLES J. RUSSO

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THE YEARBOOK
OF
EDUCATION LAW
1998

Edited by

CHARLES J. RUSSO
UNIVERSITY OF DAYTON

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Introduction

This year's chapter reviews almost two hundred cases involving public K-12 education. Even though the Supreme Court did not resolve any cases dealing with employees in 1997, this Chapter does cite precedent-setting rulings from past years where appropriate. At the same time, the Chapter excludes cases that focus primarily on procedural matters. As in previous years, the majority of cases in this Chapter examine dismissal, non-renewal, demotion, and discipline, along with school board compliance with district and state policies.

Discrimination in Employment

Discrimination claims can arise under state or federal law. Even so, the overwhelming number of cases in this section were litigated under federal law. The most commonly applied statute, title VII of the Civil Rights Act of 1964,[1] prohibits public and private educational institutions from discriminating on the basis of race, color, religion, sex, and/or national origin. Discrimination based on national origin and race is also forbidden by section 1981 of the Civil Rights Act of 1866.[2] The Americans with Disabilities Act (ADA),[3] which applies to both public and private schools, has begun to generate case law. Suits continue to be brought under section 504 of the Rehabilitation Act of 1973, which outlaws discrimination against "otherwise qualified individuals."[4] Gender-based discrimination, including sexual harassment, is proscribed by title IX of the Educational Amendments of 1972,[5] while gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.[6] Employees forty years of age or older are safeguarded by the Age Discrimination in Employment Act of 1973 (ADEA).[7] Moreover, discrimination claims can be pursued under section 1983 of the Civil Rights Act of 1871 that protects federal constitutional and statutory rights.[8] More recently, litigation has emerged under the Family Medical Leave Act (FMLA).[9]

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[1] 42 U.S.C. § 2000 *et seq.*

[2] 42 U.S.C. § 1981.

[3] 42 U.S.C. § 12101 *et seq.*

[4] 29 U.S.C. § 794.

[5] 20 U.S.C. §§ 1681 et seq.

A federal trial court in Tennessee held that since a county payroll clerk who lost her job after taking leave of absence under the FMLA was not covered by the Act, she did not have a claim.[10] Noting that the woman had worked eight months for the county school system and four months for the county government, the court acknowledged that the FMLA requires an individual to have a minimum of twelve months on the job with the same employer. The court concluded that since the FMLA does not permit employees to aggregate their work time for more than one employer, the clerk had not satisfied the twelve-month requirement.

In a section 1983 suit from Illinois, a teacher unsuccessfully filed a class action suit against school directors and their regional superintendents alleging that she and others were victims of racial discrimination in hiring.[11] A federal trial court dismissed on the ground that neither the district, nor its directors, acting in their official capacities, were "persons" under section 1983.

Race

Complaints involving racial discrimination raised several interesting issues. A case from the Eleventh Circuit presented the question of mixed motives where a school district in Alabama produced sufficient evidence to demonstrate that a black applicant for a principalship would not have been hired for reasons other than race.[12] At the same time, the court partially reversed in favor of the teacher in maintaining that he would be entitled to relief under title VII on remand if he could prove that racial discrimination was a motivating factor behind the board's employment decision.

Two other cases balanced the treatment of persons based on race. The Fifth Circuit reversed in favor of a middle school principal in Texas in a dispute over immunity.[13] The court found that the principal was entitled to qualified immunity where there was no evidence that she intended to discriminate in recommending that a white acting assistant principal should be appointed to the job permanently. Further, the court asserted that the racial discrimination charge filed by a rejected white employee after an Hispanic person was selected for the job could proceed against the superintendent even though his allegedly discriminatory conduct could not be imputed to the principal.

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[6] 29 U.S.C. § 206(d)(1).

[7] 29 U.S.C. § 621 *et seq.*

[8] 42 U.S.C. § 1983.

[9] 29 U.S.C §§ 2611 *et seq.*

[10] Rollins v. Wilson County Gov't, 967 F. Supp. 990 [119 Educ. L. Rep. 479] (M.D. Tenn. 1997).

[11] Bennet v. School Directors of Dist. 204, 941 F. Supp. 763 [113 Educ. L. Rep. 1237] (N.D. Ill. 1996).

[12] Harris v. Shelby County Bd. of Educ., 99 F.3d 1078 [113 Educ. L. Rep. 1124] (11th Cir. 1996).

The First Circuit affirmed the exclusion of evidence over the way a school system in Massachusetts dealt with three employees charged with sexual harassment.[14] The suit was filed by a black former teacher who was dismissed even though two white employees kept their jobs. The panel reasoned that the trial court had not abused its discretion in refusing to treat the two situations as similar. The court distinguished the charges on the basis that the complaint against the black teacher came from three students who alleged unwarranted touching and advances as well as phone calls to their homes while the two white employees each faced only one complaint of kissing a female student.

Religion

The Ninth Circuit upheld a damages award in favor of an elementary school principal in Idaho who was demoted to teacher because he and his wife home schooled their children.[15] The court noted that the district violated the former principal's rights to freedom of religion and due process. The court rejected the district's argument that it was concerned about his effectiveness and that his performance would have been seriously impaired by a drain of his time and energy. The court responded that the district's alleged loss of confidence in his commitment to the public schools was neither compelling nor outweighed the principal's interests. The court also reversed in favor of the principal in judging that he was entitled to attorney fees.

Sex

In a case from Illinois, the Seventh Circuit upheld an award of punitive damages under title VII against a non-public school for failing to provide adequate protection for female employees who were sexually harassed by the principal.[16] The court ascertained that the harassment, which took place over a period of years, was so pervasive that upper management had to have been aware of the principal's misbehavior. The court rejected the school's purported defense in not addressing the harassment, namely that it feared that the principal would bring charges of racial discrimination, as inadequate.

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[13] Coleman v. Houston Indep. Sch. Dist., 113 F.3d 528 [118 Educ. L. Rep 54] (5th Cir. 1997).

[14] Anderson v. Boston Sch. Comm., 105 F.3d 762 [115 Educ. L. Rep. 629] (1st Cir. 1997).

[15] Peterson v. Minidoka County Sch. Dist. No. 331, 118 F.3d 1351 [120 Educ. L. Rep. 71] (9th Cir. 1997).

In a case of same sex harassment, the federal trial court in New Hampshire left intact a teacher's charge against his principal.[17] In denying the school district's motion for summary judgment, the court declared that the appropriate standard for review was how the claim should be treated under a title VII disparate treatment theory if the teacher had been female.

An appellate tribunal in Missouri reversed a trial court's overturning the Commissioner of Education's action in dismissing a Chapter I supervisor who requested hugs from a female employee, touched her inappropriately, and treated her in a cold and unfriendly manner when she rejected his advances.[18] Rather than ground the discharge in sexual harassment under title VII, the court decreed that the supervisor violated the personnel handbook's prohibition on abusive conduct based on sex.

Age

The Supreme Court of Wyoming affirmed that school employees whose applications for early retirement were denied failed to state a *prima facie* claim under the ADEA. The court reflected that the board's delay in approving the applications applied equally to all employees and that benefits were awarded to the oldest applicants with the greatest number of years of service.[19]

A federal trial court in Illinois stated that a sixty-year-old speech-language pathologist who elected early retirement established a claim under ADEA where she was passed over for a part-time position, for which she was eligible, in favor of a younger person.[20] Subsequently, the court posited that the district failed to present a nondiscriminatory reason in refusing to hire the woman for the part-time position. The court observed that the district's decision not to hire retired employees in light of its expressed need for continuity in teaching personnel was based on "inaccurate and stigmatizing stereotypes"[21] concerning older employees as short-term workers.

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[16] Jonasson v. Lutheran Child and Family Servs., 115 F.3d 436 [118 Educ. L. Rep. 853] (7th Cir. 1997).

[17] Madon v. Laconia Sch. Dist., 952 F. Supp. 44 [116 Educ. L. Rep. 253] (D.N.H. 1996).

[18] Snyder v. Department of Elementary and Secondary Educ., 952 S.W.2d 764 [121 Educ. L. Rep. 862] (Mo. Ct. App. 1997).

[19] Peterson v. Sweetwater County Sch. Dist. No. 1, 929 P.2d 525 [115 Educ. L. Rep. 116] (Wyo. 1996).

[20] Kastel v. Winnetka Bd. of Educ., Dist. 36, 946 F. Supp. 1329 [114 Educ. L. Rep. 1102] (N.D. Ill. 1996).

Likewise, an aide in New York prevailed in her claim that she was denied a position as a regular teacher due to her age.[22] A federal trial court rejected a motion for summary judgment where there were material questions of fact as to whether the district proffered legitimate, nondiscriminatory reasons for not hiring the woman and whether its accrual of back pay liability under the ADEA was tolled.

In a case of first impression from Virginia, a teacher unsuccessfully filed suit against her district and school officials.[23] A federal district court determined that there was no individual liability under ADEA or title VII where alleged discriminatory actions were undertaken by employees on behalf of their employer.

According to the federal district court in Kansas, a teacher who retired rather than face a pre-termination hearing failed to establish that the school district's reasons for acting were a pretext for age discrimination.[24] The court indicated that the district had sufficient support to propose a hearing where nine different students complained about objectionable comments that the teacher made in class over a four-month period.

National Origin

The federal district court in Kansas was of the opinion that a Spanish teacher of Hispanic origin who spoke with an accent and so rapidly that students could not understand her failed to state a claim under title VII.[25] The court contended that since the teacher refused to address concerns that affected her teaching effectiveness, the district had a legitimate business reason for not renewing her contract.

In Delaware, an African-American male who was born in Panama survived a school district's motion for summary judgment in his title VII national origin and race discrimination complaint.[26] The court was satisfied that the teacher introduced evidence that the interview process for filling vacant positions as team leaders was a sham because the persons who were eventually hired were referred to by that title before the process was completed.

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[21] Kastel v. Winnetka Bd. of Educ. Dist. 36, 975 F. Supp. 1072, 1079 [121 Educ. L. Rep 647] (N.D. Ill. 1997).

[22] Eastmer v. Williamsville Cent. Sch. Dist., 977 F. Supp. 207 [121 Educ. L. Rep. 1019] (W.D.N.Y. 1997).

[23] Thayer v. Washington County Sch. Bd., 949 F. Supp. 445 [115 Educ. L. Rep. 824] (W.D. Va. 1996).

[24] Schartz v. Unified Sch. Dist. No. 512, 953 F. Supp. 1208 [116 Educ. L. Rep. 645] (D. Kan. 1997).

[25] Forsythe v. Board of Educ. of Unified Sch. Dist. No. 489, 956 F. Supp. 927 [117 Educ. L. Rep. 161] (D. Kan. 1997).

[26] Lewis v. State of Delaware Dep't of Pub. Instruction, 948 F. Supp. 352 [115 Educ. L. Rep. 683] (D. Del. 1996).

Disability

School systems won only the first of this year's three suits involving disability claims. In Indiana, a federal trial court decided that the executive director of the state teacher's association could not concurrently bring an ERISA action claiming that he was entitled to long-term disability benefits since he was totally disabled while simultaneously filing an ADA action alleging that he was capable of performing the essential functions of his job.[27] The court added that the executive director was not a qualified individual with a disability under the ADA.

On the other hand, a federal district court in Illinois ruled that a maintenance worker had a cause of action as to whether a school system accommodated his reduced work restrictions, created a new job, and refused to hire him to fill it by creating vital functions that he could not perform.[28] The court framed the issue for trial as whether the district had an obligation under the ADA to further accommodate the employee's work-related injuries with reference to the new vital functions.

The Seventh Circuit reversed a grant of summary judgment in favor of a school district in Indiana that fired a custodian who returned to work from a series of disability leaves based on his mental illnesses.[29] The court pointed out that since this was a reasonable accommodation, not a disparate treatment case, the custodian raised a material issue of fact as to whether he could have performed the essential functions of his job.

Substantive Constitutional Rights

This section discusses First Amendment and constitutional rights of persons who have liberty and property interests that the government cannot treat arbitrarily or capriciously. Cases involving the state arise under the Fourteenth Amendment while those concerning the federal government are brought pursuant to the Fifth Amendment.

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[27] Ross v. Indiana State Teacher's Ass'n, 955 F. Supp. 1025 [116 Educ. L. Rep. 1013] (N.D. Ind. 1997).

[28] Hammer v. Board of Educ. of Arlington Heights, Sch. Dist. No. 25, 955 F. Supp. 921 [116 Educ. L. Rep. 1006] (N.D. Ill. 1997).

[29] Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281 [114 Educ. L. Rep. 372] (7th Cir. 1996).

Speech

Success in free speech cases was divided approximately evenly between school districts and employees. Moreover, as reflected by the first five cases in this section, matters of public concern played key roles in these disputes. In a case from Illinois, a district appealed the denial of its motion to dismiss an action filed by a school psychologist whose contract was not renewed. The psychologist claimed that her employment was terminated because she complained to her superintendent and principal that she was allegedly brow-beaten by her immediate supervisor. The Seventh Circuit, reversing in favor of the district, decided that since the psychologist's remarks did not rise to the level of public concern, they were not protected free speech.[10] The court added that retaliation in employment matters for private speech is not covered under the First Amendment.

The Eighth Circuit, reversing a grant of summary judgment in favor of a district in Minnesota, held that since a social worker's criticism of a school's policy on reporting suspected child abuse was related to a matter of public concern, it was protected by the First Amendment.[11] The court asserted that the protection applied even if the statements had been made only to district personnel.

Similarly, an appellate court in California ordered the reinstatement of a secretary who was suspended after she revealed a possible conflict of interest in the awarding of a public contract.[12] What made this case interesting was that the notice of possible conflict of interest had been faxed to the sixteen unsuccessful bidders. The court reasoned that a statement does not lose its quality of public concern simply because it is made privately rather than in a public meeting or through the media. More specifically, the person who checked references and sat on the interview panel making the final recommendation for selection failed to avoid the appearance of impropriety that created the opportunity for the conflict of interest charge.

In a slightly different vein, a high school teacher from North Carolina appealed the dismissal of her claim that a district violated her First Amendment rights when she was transferred to a middle school after being criticized over a play that her students performed. The Fourth Circuit, reversing in favor of the teacher, acknowledged that the teacher was not required to establish initially that her speech related to a matter of public concern before the burden shifted to school officials to justify the restrictions that they sought to impose.[33] The court held the teacher's conduct in selecting, directing, and producing the play was a constitutionally protected form of expression.

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[10] Khuans v. School Dist. 110, 123 F.3d 1010 [121 Educ. L. Rep. 29] (7th Cir. 1997).

[11] Calvit v. Minneapolis Pub. Schs., 122 F.3d 1112 [120 Educ. L. Rep. 952] (8th Cir. 1997).

[12] Kirchmann v. Lake Elsinore Unified Sch. Dist., 67 Cal.Rptr.2d 268 [120 Educ. L. Rep. 523] (Cal. Ct. App. 1997).

The Third Circuit also ruled on a case illustrating the general rule that one of the requirements of a free speech claim is that a claimant must bring the facts within the protectable definition of the Free Amendment. The court agreed that a principal in Pennsylvania could remove a teacher who was the school's business manager, yearbook advisor, and chair of the English Department on the basis that he mistakenly believed that the instructor contacted the press about a matter of public interest.[34] When the teacher admitted that he had not contacted the press, the court maintained that he lost the free speech basis for his retaliation claim. However, the court judged that the teacher had claims under the Fair Labor Standards Act and the National Labor Relations Act.

Successful claims in school related disputes raised other free speech issues. A federal trial court in New York observed that board members can be liable individually under section 1983,even though they are immune in their official capacities. The board had secured a temporary restraining order (TRO) against a PTA president and board candidate that was dismissed with prejudice when the board failed to produce evidence that the plaintiffs intended to reveal any confidential information. The court reasoned that since a TRO could constitute a "chilling of [the plaintiffs'] First Amendment rights,"[35] it would not grant a motion for summary judgment.

A federal district court in California enjoined the enforcement of a bylaw that prohibited members of the public from presenting claims or charges against school employees at board meetings. In invalidating the bylaw under the First Amendment, the court mandated that since the board meeting was a limited public forum, "the District's concerns and interests in proscribing public commentary cannot outweigh the public's fundamental right to engage in robust public discourse in school issues."[36]

According to an appellate court in Colorado, a school system violated the First Amendment rights of a language arts teacher by terminating his contract for showing an "R" rated movie that included scenes displaying nudity, sexual conduct, drug use, and violence.[37] The court did not have to reach the merits of whether the district's controversial learning resources policy was constitutional because the rule was not in the faculty handbooks.

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[33] Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474 [113 Educ. L. Rep. 1069] (4th Cir. 1996).

[34] Fogarty v. Boles, 121 F.3d 886 [120 Educ. L. Rep. 658] (3d Cir. 1997).

[35] Mazza v. Hendrick Hudson Cent. Sch. Dist., 942 F. Supp. 187, 192 [114 Educ. L. Rep. 101] (S.D.N.Y. 1996).

[36] Leventhal v. Vista Unified Sch. Dist., 973 F. Supp. 951, 957 [121 Educ. L. Rep. 95] (S.D. Cal. 1997).

Two cases addressed issues that fell short of free speech. A teacher in Minnesota appealed a judgment that she did not have a free speech right to refuse to discuss her classroom performance, grading, and attitude with her principal. The Eighth Circuit affirmed the teacher's dismissal due to her performance deficiencies and insubordination.[38] The court found that the First Amendment does not authorize a teacher to be uncooperative in discussing disruptive classes and obstructing discipline by refusing to meet with the principal about problem areas.

In a similar case, a teacher who was transferred, placed on probation, had his salary frozen, and given an unsatisfactory rating after testifying about his high school's grading policies for athletes, unsuccessfully challenged the dismissal of his claim for failing to state a claim for which a remedy was appropriate.[39] An appellate court in Texas declared both that the teacher was not constructively discharged and that he lacked academic freedom to ignore a directive from his principal ordering him to assign a passing grade to a student-athlete.

Questions of free speech can also be tied to procedural matters. The federal trial court in Nevada stated that a police officer who was assigned to a junior high school could not plead his case anonymously.[40] The officer alleged that after he endorsed a candidate for school trustee and exposed departmental hiring, disciplinary, and promotional practices, officials retaliated against him by enforcing a policy of random psychological tests for all officers. The officer claims this policy, which was later rescinded, was enforced only to force him to undertake a psychological exam. The officer sought anonymity because he believed that his effectiveness would have been impaired when others learned that he allegedly attempted suicide with his own service revolver. The court posited that since the suit was against individual defendants, anonymity would have prejudiced their ability to respond to the officer's claim.

In Texas, an appellate court agreed that a school employee whose contract is nonrenewed must exhaust administrative remedies before questioning a reassignment.[41] In affirming the dismissal of an administrator's complaint, the court noted that although exhaustion is not required when solely constitutional questions are involved, it was necessary here since it raised factual and constitutional issues. The court concluded it was question of fact as to whether the administrator was reassigned for personal reasons or because school officials violated his right to free speech by retaliating against him for protesting the change.

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[37] Wilder v. Board of Educ. of Jefferson County Sch. Dist. R-1, 944 P.2d 598 [121 Educ. L. Rep. 340] (Colo. Ct. App. 1997).

[38] Berg v. Bruce, 112 F.3d 322 [117 Educ. L. Rep. 895] (8th Cir. 1997).

[39] Bates v. Dallas Indep. Sch. Dist., 952 S.W.2d 543 [121 Educ. L. Rep. 414] (Tex. Ct. App. 1997).

[40] Doe v. Goldman, 169 F.R.D. 138 [114 Educ. L. Rep. 535] (D. Nev. 1996).

[41] Hicks v. Lamar Consol. Indep. Sch. Dist., 943 S.W.2d 540 [117 Educ. L. Rep. 1137] (Tex. Ct. App. 1997).

A case from Pennsylvania varies from the general rule that silence can, at times, constitute protectable free speech. A federal district court upheld the dismissal of a superintendent who remained silent during political comments made by a third party at an administrative staff meeting which linked school board members to groups opposing education.[42] The court indicated that even if silence constituted protected speech, the district's overriding concern in the efficient operations of the schools outweighed the superintendent's interests.

Association

In the first of two cases from New Jersey, both of which were won by school districts, the federal trial court granted the system's motion for summary judgment where a teacher claimed that he was denied a promotion to an administrative position because he refused to become involved in a civic organization that supports candidates for political office.[43] The court determined the teacher failed to produce evidence that his noninvolvement was a motivating factor in the district's action, and found that the exisitng evidence showed he would not have been promoted even if he had been a member of the organization.

The same court also held that a custodian whose position had been eliminated failed to establish a prima facie case that he was dismissed because he belonged to a different political party than the majority of the board.[44] The court reasoned that the former custodian's First Amendment claim failed since he did not produce evidence that board members conspired among themselves or with a local political leader to eliminate his job.

Privacy

An appellate court in Michigan ruled that the state's Freedom of Information Act (FOIA) applies to evaluations performed by school district officials. After a teacher pleaded guilty to carrying a concealed weapon, the district denied a local newspaper's request for a copy of his evaluations, disciplinary and attendance records, complaint letters, and a memorandum about his performance. In contending that none of these items were protected from disclosure, the court reflected that "[t]he FOIA protects a citizen's right to examine and to participate in the political process . . . ."[45]

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[42] Coover v. Saucon Valley Sch. Dist., 955 F. Supp. 392 [116 Educ. L. Rep. 979] (E.D. Pa. 1997).

[43] Ramiero v. Antun, 943 F. Supp. 413 [114 Educ. L. Rep. 493] (D.N.J. 1996).

[44] D'Aurizio v. Palisades Park, 963 F. Supp. 387 [118 Educ. L. Rep. 921] (D.N.J. 1997).

According to an appellate court in Colorado, a settlement agreement between a superintendent and school board, whereby he resigned for "personal reasons" and board members would not make statements contrary to the announced reason for his departure, was void as a violation of public policy. The superintendent sued the board members alleging that they disregarded the confidentiality provisions of the agreement after a newspaper reported allegations that he was paid to resign because he had sexually harassed employees. In upholding a grant of summary judgment in favor of the board, the court decreed that the interest of confidentiality in encouraging settlements "must give way in circumstances such as this in which a governmental entity attempts to conceal from public knowledge the circumstances surrounding the departure of a public official and payment of public funds."[46]

Substantive Due Process

Schools systems won the first two of the four cases in this section. The federal appellate court for the District of Columbia upheld emergency reduction-in-force (RIF) procedures authorized by Congress that permitted RIF on a school-wide, rather than district-wide, basis and permitted consideration of factors other than seniority. The court rebuffed a charge by the teachers' union that shifting such matters from central office to principals violated substantive due process. The court retorted that "no one could reasonably suggest that the emergency rules were irrational, or that they shocked the conscience or were used for purposes of oppression."[47]

A federal trial court in Ohio refused to disturb a school board's choice not to rehire substitute bus drivers who received unemployment compensation during the previous summer rather than those who did not.[48] The court offered that under the Equal Protection Clause, the board had a legitimate interest in protecting funds used to operate the school system.

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[45] Herald Co. Inc. v. Ann Arbor Pub. Sch., 568 N.W.2d 411, 414 [120 Educ. L. Rep. 1153] (Mich. Ct. App. 1997).

[46] Pierce v. St. Vrain Valley Sch. Dist. RE-1J, 944 P.2d 646, 651 [121 Educ. L. Rep. 351] (Colo. Ct. App. 1997).

[47] Washington Teachers' Union Local # 6, Am. Fed'n of Teachers v. Board of Educ. of the Dist. of Columbia, 109 F.3d 774, 781 [117 Educ. L. Rep. 42] (D.D.C. 1997).

[48] Valot v. Southeast Local Sch. Dist., 957 F. Supp. 991 [117 Educ. L. Rep. 527] (N.D. Ohio 1995).

The federal district court in Rhode Island held that the application of the state's Eviction Act to employees of teachers' unions who were legally vested in the state's pension program violated substantive due process.[49] According to the court, the state failed to enunciate a purpose that was rationally related to a legitimate goal in extinguishing the property interests of workers who were vested in the program. The court added that the statutory changes were constitutional as to employees who were not vested in the fund.

In Maine, the federal district court ascertained that a school guidance counselor violated the substantive due process rights of a sixth grade student when the counselor did not seek the consent of the student's parents before permitting a police officer to interrogate the student in the counselor's office.[50] The court was of the opinion that while the counselor was not entitled to qualified immunity, the district was free from liability under section 1983 because it did not have a policy or practice that permitted such violations of student rights.

Procedural Due Process

Except for emergency suspensions with pay, the Constitution mandates that procedural due process must be followed before adverse employment actions can be taken against personnel who have liberty and property interests.[51] Although the type of due process varies depending upon the nature and severity of the anticipated consequences, its essence is notice and a fair opportunity to respond to the charges.

An appellate court in Pennsylvania confirmed a school board's right to delegate the task of conducting a hearing to a hearing officer. As such, a former school custodian unsuccessfully claimed that the board violated state law even though the court agreed that "[d]ue process requirements are fully applicable to adjudicative hearings involving substantial property rights before administrative tribunals."[52]

Liberty and Property Interests

A case from Minnesota had elements of both an entitlement for the sake of property rights and the need for a name-clearing hearing for the purposes of liberty interests. An elementary school principal who was dismissed from her job for not revealing a prior felony conviction on her employment application claimed that she had a property interest in the duration of her contract. In denying the district's motion for summary judgment, the federal trial court observed that genuine issues of material fact existed as to whether the former principal received appropriate notice and opportunity to a name-clearing hearing.[53] The court added that since school officials knew about notice and hearing requirements from past experience, they were not entitled to qualified immunity.

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[49] National Educ. Ass'n-Rhode Island v. Retirement Bd. of the Rhode Island Employees' Retirement Sys., 972 F. Supp. 100 [120 Educ. L. Rep. 1006] (D.R.I. 1997).
[50] Grendell v. Gillway, 974 F. Supp. 46 [121 Educ. L. Rep. 127] (D. Me. 1997).
[51] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 [23 Educ. L. Rep. 473] (1985).
[52] Lewis v. School Dist. of Philadelphia, 690 A.2d 814, 816-7 [116 Educ. L. Rep. 1085] (Pa. Commw. Ct. 1997).

In another case relating to property interests, an appellate court in Louisiana reversed in favor of a teacher who filed a section 1983 claim when he was not rehired a year after returning to work from a disability leave.[54] Based on its finding that the teacher had a property interest in his job, the court found that the district's replacing him with a noncertified teacher constituted an official policy within the meaning of section 1983.

School districts were generally successful in property interest suits where claimants were unable to show expectations of employment. The Supreme Court of Kansas reversed in favor of a board where a principal claimed that he was denied due process because the school system showed good cause in nonrenewing his contract.[55] The court reasoned that the only expectation of continuing employment that the principal had was that the board would follow the procedures in the state's Administrator's Act. The court concluded that since the principal received notice of nonrenewal by the date specified in the law, he was not entitled to any additional due process.

The Supreme Court of Tennessee reversed in favor of a school district that was accused of violating due process in refusing to place the name of a discharged teacher on its list of approved substitutes.[56] The court pointed out that since the discharged teacher did not have a property interest in continued employment, his attempts to regain his job amounted to a unilateral expectation.

In a case from Kentucky, the Sixth Circuit affirmed in favor of a school board where a former administrator claimed that it violated her property rights.[57] Relying on state law, the court maintained that since a contract without a fixed term constituted at-will employment, the administrator lacked a constitutionally protected property interest.

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[53] Coleman v. Special Sch. Dist. No. 1, 959 F. Supp. 1112 [118 Educ. L. Rep. 106] (D. Minn. 1997).

[54] Graham v. St. Landry Parish Sch. Bd., 689 So. 2d 595 [116 Educ. L. Rep. 1311] (La. Ct. App. 1997).

[55] Brown v. Board of Educ., Unified Sch. Dist. No. 333, Cloud County, 928 P.2d 57 [114 Educ. L. Rep. 1221] (Kan. 1996).

[56] Rowe v. Board of Educ. of City of Chattanooga, 938 S.W.2d 351 [116 Educ. L. Rep. 503] (Tenn. 1996).

[57] Bailey v. Floyd County Bd. of Educ., 106 F.3d 135 [115 Educ. L. Rep. 650] (6th Cir. 1997).

According to a federal trial court in Missouri, a substitute teacher did not have a property interest in his job.[58] The court asserted that the teacher's claim was without merit since his employment had no definite duration, he was called on as-needed basis, and he failed to demonstrate the support of federal or state statutes or regulations or contract language that could give rise to a property interest.

In Texas, a federal trial court stated that the reassignment of a band director to an elementary teaching position did not involve a property interest.[59] The court decided in favor of the board since reassignment was permitted under the educator's contract and he had no expectancy of being a band director beyond the current year.

A case from Georgia reflects the notion that liability may depend on whether immunity is available to those who allegedly violate the rights of another. The Eleventh Circuit reversed in favor of school board members who were denied immunity after they relieved a superintendent of his duties while continuing to pay his salary.[60] The court noted that since the board members could not have reasonably believed they were acting illegally, they were entitled to qualified immunity in the face of the superintendent's deprivation of a property right claim.

Aspects of Notice

Notice is important as a means of determining charges against persons who are accused of violating school rules. A federal district court in Delaware upheld the form of the pretermination notice given to a cheerleader coach/teacher who resigned after numerous accusations about the way in which she handled the team's funds.[61] The court agreed that when the principal and a school board member questioned the former educator in an accusatory manner about her alleged wrongdoing, she had sufficient notice of the charges to satisfy due process.

An appellate court in Missouri affirmed that a principal whose employment was terminated before the completion of her contract received her procedural rights to notice since she was informed at the beginning of the school year about job targets, had her performance monitored, and was continually notified in writing about her deficiencies.[62] The court added that the former principal received notice of her termination but waived her right to a hearing.

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[58] Poynton v. Special Sch. Dist. of St. Louis County, 949 F. Supp. 1407 [115 Educ. L. Rep. 846] (E.D. Mo. 1996).

[59] Cruse v. Clear Creek I.S.D., 976 F. Supp. 1068 [121 Educ. L. Rep. 972] (S.D. Tex. 1997).

[60] Harris v. Board of Educ. of the City of Atlanta, 105 F.3d 591 [115 Educ. L. Rep. 360] (11th Cir. 1997).

[61] Barkauskie v. Indian River Sch. Dist., 951 F. Supp. 519 [116 Educ. L. Rep. 115] (D. Del. 1996).

On the other hand, failure to provide appropriate notice may result in strong juicial action. An appellate court in Wisconsin affirmed that a teacher was entitled to a writ of mandamus that required her district to provide appropriate statutory notice.[63] The court said that the teacher was entitled to the writ even though an arbitrator ruled the district had just cause in nonrenewing her contract because the district could not waive the teacher's statutory right to notice.

As reflected by a case from Alabama, the right to notice does not necessarily extend to other rights. A federal trial court granted a school board's motion for summary judgment in a dispute where it refused to allow a tenured employee to depose all of the witnesses against him prior to his termination hearing. The court decreed that the board had not violated the employee's procedural rights since the employee received notice of the charges, the names of witnesses, and copies of the documents that shaped its case. The court declared the employee neither cited a source nor " . . . found any authority which supports the proposition that [he] has a due process right to depose the Board's witnesses prior to the cancellation hearing."[64]

Aspects of Hearing

A hearing can be important even before a school board removes a person from a position. A federal trial court in New York posited that a former principal whose job was one of three to be eliminated as part of a cost-cutting move presented a genuine issue of material fact as to whether the other two positions were similar under state law.[65] The court reflected that since the former principal had tenure, she was entitled to a pre-termination hearing to determine whether her property interests were violated.

The right to a hearing can be based on a property interest that a school board creates in a hearing. Accordingly, a federal trial court in Texas adjudicated that the dismissal of a teacher without either giving her notice of its proposed action or affording her an opportunity to request a hearing violated her right to due process.[66]

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[62] McCormack v. Maplewood-Richmond Heights Sch. Dist., 935 S.W.2d 703 [115 Educ. L. Rep. 171] (Mo. Ct. App. 1996).

[63] Sterlinske v. School Dist. of Bruce, 565 N.W.2d 273 [119 Educ. L. Rep. 267] (Wis. Ct. App. 1997).

[64] Frizzell v. Autauga County Bd. of Educ., 972 F. Supp. 564, 565 [120 Educ. L. Rep. 1027] (M.D. Ala. 1997).

[65] Elmendorf v. Howell, 962 F. Supp. 326 [118 Educ. L. Rep. 616] (N.D.N.Y. 1997).

Aspects of a hearing can also influence the manner in which it is conducted. The Supreme Court of South Carolina reversed in favor of a school board, thereby upholding the termination of a teacher's contract for unprofessional conduct after she encouraged students to walk out of class to protest the demotion of an assistant principal. The trial court indicated that the teacher's procedural rights were violated where the county superintendent, who was also the board's executive secretary, retired with it into executive session. Even though the board's action was not recorded, the court held that the teacher failed to meet the standard of "substantial prejudice" in her due process claim. The court judged that since "school board members are clothed with a presumption of honesty and integrity 'actual bias'"[67] must be shown before a hearing tribunal can be disqualified.

Dismissal, Nonrenewal, Demotion, and Discipline

This introductory section addresses ancillary issues. For example, the Supreme Court of Michigan affirmed that the "nonrenewal" of an administrator's contract refers either to the termination of a position or of an employment relationship. As such, the court offered that an assistant principal who was reassigned to a nonadministrative job was not entitled to the statute's protection.[68]

The first of two cases from New York involved a school district's elimination of the job of its Director of Personnel and its failure to transfer her to a comparable position. An appellate court reversed a writ of prohibition that would have blocked the district from taking disciplinary action against the administrator due to her refusal to report to work.[69] According to the court, all of the issues could be addressed in the educator's pending breach of contract suit.

In the second suit, another appellate court in New York affirmed the termination of a probationary teacher's contract.[70] The court ascertained that notice from the superintendent that he would not recommend the teacher for contract renewal was not a final order subject to review.

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[66] Rogan v. Lewis, 975 F. Supp. 956 [121 Educ. L. Rep. 634] (S.D. Tex. 1997).

[67] Felder v. Charleston County Sch. Dist., 489 S.E.2d 191, 193-4 [120 Educ. L. Rep. 616] (S.C. 1997).

[68] Sanders v. Delton Kellogg Schs., 556 N.W.2d 467 [114 Educ. L. Rep. 937] (Mich. 1996).

[69] Ashe v. Enlarged City Sch. Dist. of Troy, 649 N.Y.S.2d 97 [114 Educ. L. Rep. 263] (N.Y. App. Div. 1996).

[70] Perlin v. South Orangetown Cent. Sch. Dist., 658 N.Y.S.2d 141 [118 Educ. L. Rep. 1084] (N.Y. App. Div. 1997).

An insurance company sought further review of a finding of liability for failing to defend the religious order that operated a parochial school after a teacher won a $5 million judgment against it in his wrongful discharge suit. An appellate court in Illinois agreed that since the religious order reasonably believed that it was covered by its insurance policy and waived all defenses, the company remained liable.[71]

In California, an appellate court affirmed that a basketball coach who was convicted of battering one of his female players did not have the right to a jury instruction that certified school employees could not be held criminally liable for exercising the same degree of physical control as parents.[72] The tribunal was of the opinion that the trial court did not abuse its discretion when it originally submitted, but later withdrew, such an instruction prior to the jury's verdict, because the directions followed the language in the state's Education Code.

A bus driver successfully challenged a school board's decision to dismiss him rather than follow a hearing examiner's recommendation that he be suspended for three days. An appellate court in Florida reversed in favor of the driver.[73] The court agreed that since the driver was unaware that his license had been technically suspended, but promptly took steps to have it reinstated, dismissal was excessive and disproportionate punishment.

Insubordination

As reflected in a case from the Supreme Court of Colorado, school districts had success in disciplining teachers for insubordination. The court upheld the discharge of a tenured music teacher for tapping a third grade student on the head to get his attention since this was her fourth incident of inappropriate physical contact with children over an eight-year period.[74]

Similarly, an appellate court in New York affirmed the dismissal of a tenured elementary teacher for striking a student in the eye.[75] The court pointed out that the teacher had already received written and oral warnings not to use excessive force.

A case from Illinois demonstrates that the dismissal of a tenured teacher for insubordination depends on the reasonableness of the rule in question. An appellate court affirmed a judgment in favor of a teacher who was dismissed for scheduling a vacation during a winter break that was eliminated due to a lengthy strike in the district.[76] In observing that the superintendent made herself the sole judge of whether teachers could miss assignments to take planned vacations, the court found that since district employees were unaware of this unreasonable ad hoc rule, it could not serve as the basis for a dismissal for insubordination.

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[71] Society of Mt. Carmel v. National Ben Franklin Ins. Co. of Ill., 682 N.E.2d 1180 [120 Educ. L. Rep. 537] (Ill. App. Ct. 1997).

[72] People v. Nelson, 67 Cal.Rptr.2d 899 [121 Educ. L. Rep. 269] (Cal. Ct. App. *1997*).

[73] Centellas v. School Bd. of Dade County, 683 So. 2d 644 [114 Educ. L. Rep. 996] (Fla. Dist. Ct. App. 1196).

[74] Board of Educ. of West Yuma Sch. Dist. RJ-1 v. Flaming, 938 P.2d 151 [118 Educ. L. Rep. 1202] (Colo. 1997).

[75] Newman v. Sobol, 649 N.Y.S.2d 67 [114 Educ. L. Rep. 254] (N.Y. App. Div. 1996).

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

Cases were about evenly divided between school districts and their employees. The Supreme Court of Mississippi reasoned that a district had the authority to suspend a principal for one year after he allowed students to read prayers over the high school's intercom.[77] The court concluded that the principal's seeking, but disregarding, the opinion of the district's attorney that the prayers were unconstitutional and could result in expensive litigation constituted good cause for suspension.

The Supreme Court of Minnesota reinstated the dismissal of a school custodian who gave money to children to help him with his work, played flashlight tag with them in the building when the lights were out, had water fights with them, invited them to play on the roof, and told them to lie if they were caught there.[78] The court rejected the custodian's argument that his behavior was justified by extenuating circumstances.

An appellate court in Pennsylvania upheld a school system's dismissal of a transportation supervisor for appropriating district services and supplies to his own use on at least twenty-five occasions.[79] The court maintained that even though the district did not have a policy that addressed the ability of employees to make personal use of its resources, the supervisor's conduct was improper for the purposes of dismissal under state law.

In New York, an appellate court affirmed the firing of a teacher who admitted that he physically assaulted his superintendent and verbally harassed two spectators at a basketball game for which he had been a timekeeper.[80] The court agreed that there was substantial evidence to support a hearing panel's determination that the former educator engaged in conduct unbecoming a teacher.

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[76] Board of Educ. of Round Lake Area Schs. v. State Bd. of Educ., 685 N.E.2d 309 [121 Educ. L. Rep. 821] (Ill. App. Ct. 1997).

[77] Board of Trustees of the Jackson Pub. Sch. Dist. v. Knox, 688 So. 2d 778 [116 Educ. L. 841] (Miss. 1997).

[78] Wagner v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1, 569 N.W.2d 529 [121 Educ. L. Rep. 838] (Minn. 1997).

[79] Barhight v. Board of Directors of the Bradford Area Sch. Dist. 689 A.2d 327 [116 Educ. L. Rep. 680] (Pa. Commw. Ct. 1997).

[80] Healy v. Clifton-Fine Cent. Sch. Dist., 658 N.Y.S.2d 740 [119 Educ. L. Rep. 208] (N.Y. App. Div. 1997).

An appellate court in Indiana upheld a district's termination of the contract of a school bus driver who made racially inappropriate and threatening remarks in front of an African-American student and an African-American bus aide.[81] The court ruled that even though the driver had a one-year-written contract, his remarks were sufficiently abusive to justify the termination of his contract.

The relationship between a hearing panel and subsequent levels of appeal can be at the heart of applying appropriate penalties. An appellate court in New York affirmed that the Commissioner of Education did not act arbitrarily in terminating a teacher's contract for misconduct rather than accept a hearing panel's recommendation to suspend him for nine-months.[82] In addition to the misbehavior at issue, the court acknowledged that the teacher admitted to past instances of misconduct, one of which had resulted in a three-month suspension without pay.

Conversely, another appellate court in New York stated that the Commissioner of Education's reversal of a hearing panel's decision dismissing charges against a tenured teacher was arbitrary and irrational.[83] The court noted that since the panel declared the teacher guilty of sexual charges, and recommended a severe reprimand, the Commissioner exceeded his authority by ignoring the panel's findings.

As reflected in a case from Tennessee, the relationship between criminal and administrative proceedings can form the basis for litigation. An appellate court affirmed that a tenured teacher whose felony conviction for sexual battery was eventually reversed could be dismissed even though the charges of improper sexual conduct had not been heard at the pretermination hearing.[84] The court decided both that the teacher's dismissal based on his felony conviction did not prevent a *de novo* hearing of the underlying allegations and that he was not prejudiced by this later hearing because he had notice of the charges.

Misconduct may be related to an employee's performance at a hearing. An appellate court in Pennsylvania upheld a school district's dismissal of a custodian who was involved in a conspiracy to purchase marijuana.[85] The court posited that the board could infer that the custodian was involved in the conspiracy based on his invocation of his Fifth Amendment privileges and silence at the hearing since the questions directed at him were not overly broad and related specifically to the charge at issue.

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[81] Kokomo Center Township Consol. Sch. Corp. v. McQueary, 682 N.E.2d 1305 [120 Educ. L. Rep. 249] (Ind. Ct. App. 1997).

[82] Healy v. Sheldon, 652 N.Y.S.2d 886 [115 Educ. L. Rep. 457] (N.Y. App. Div. 1997).

[83] McMahon v. Sobol, 651 N.Y.S.2d 742 [115 Educ. L. Rep. 49] (N.Y. App. Div. 1997).

[84] Enochs v. Nerren, 949 S.W.2d 686 [120 Educ. L. Rep. 849] (Tenn. Ct. App. 1997).

[85] Harmon v. Mifflin County Sch. Dist., 684 A.2d 651 [114 Educ. L. Rep. 212] (Pa. Commw. Ct. 1996).

Courts have refused to support discipline for employees in a variety of situations. For example, the Supreme Court of Idaho affirmed that a single heated public exchange between a principal and a teacher who was subsequently fired did not rise to the level of misconduct that rendered the latter ineligible for unemployment compensation benefits.[86]

In the first of two cases from New York, an appellate court annulled a hearing officer's determination of misconduct that led to the dismissal of a school monitor.[87] The court declared that the hearing officer should not have implicitly assumed that the monitor was unable to perform his duties simply because he made three trips abroad while on medical leave. The court contended that the monitor was not required to walk and stand while traveling, two activities that were a large part of his assigned responsibilities.

The second case from New York reflects the rule that the reasonableness of a penalty can play a role in discipline. An appellate court reversed a board of education's dismissal of a school bus driver, who had a good disciplinary record in his fourteen years of working for the system, as unfair and disproportionate.[88] The court ascertained that even though he admitted to driving in excess of the fifty-five miles per hour limit, this was the first ticket the driver had received in the forty-three years that he had had his license.

In a second case that hinged on the reasonableness of a penalty, an appellate court in Florida reversed in favor of a custodian who had sexual relations with his girlfriend on school premises. The court indicated that the penalty was too severe since the custodian had not been subject to discipline during his eleven years of employment with the district, no students were in the building when the act occurred, and the operative collective bargaining agreement incorporated the concept of progressive or corrective discipline.[89]

The first of two cases from Louisiana upheld the reversal of a school board's termination of a tenured teacher's contract for willful neglect of duty.[90] An appellate court rejected the board's argument that the teacher slept in bed with a female student after a party and that exchanging notes expressing mutual affection demonstrated an improper teacher-student relationship. In ordering the teacher's reinstatement with back pay, allowances, and retirement contributions, the court observed that she and the student were related by marriage, grew up together, and vehemently denied any impropriety in their relationship.

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[86] Folks v. Moscow Sch. Dist. No. 281, 933 P.2d 642 [116 Educ. L. Rep. 1244] (Idaho 1997).

[87] Miller v. Board of Educ. of the N. Colonie Cent. Sch. Dist., 657 N.Y.S.2d 252 [118 Educ. L. Rep. 442] (N.Y. App. Div. 1997).

[88] Smith v. Board of Educ. of Taconic Hills Cent. Sch. Dist., 652 N.Y.S.2d 666 [115 Educ. L. Rep. 439] (N.Y. App. Div. 1997).

[89] Bell v. School Bd. of Dade County, 681 So. 2d 843 [113 Educ. L. Rep. 1351] (Fla. Dist. Ct. App. 1996).

[90] Holt v. Rapides Parish Sch. Bd., 685 So. 2d 501 [115 Educ. L. Rep. 223] (La. Ct. App. 1996).

A second appellate court in Louisiana called for the reinstatement, with salary and compensation, but not attorney fees, of a special education teacher who was fired due to the inappropriate behavior of his students in his class for children with behavioral disorders and emotional disabilities.[91] The court ruled the failure of a tenured teacher to maintain control of a class of such students was insufficient to support demotion for willful neglect of duty since the term "willful" requires some deliberate action to avoid or fail to perform a clear duty of employment. The court pointed out the teacher had taken every action he could conceive of in his efforts to fulfill the school's duty to maintain discipline.

Immorality

As reflected in a case from Massachusetts, the nature of an immoral act can influence a disciplinary decision. An appellate court affirmed the reduction of a school custodian's penalty from dismissal to a one-year suspension.[92] The court judged that the superintendent's dismissing the custodian for engaging in a homosexual act in a public park in broad daylight with an adult over the age of sixty was inappropriate as it was not committed on school grounds.

Generally, sexual acts with students can result in discharge, even when they took place years earlier. An appellate court in Washington upheld the dismissal of a teacher as a matter of law even though his sexual contact with two high school students occurred seven years earlier. The court held that the teacher's conduct was not remediable because it "lack[ed] a positive educational aspect or legitimate professional purpose . . . ."[93]

A case from New York demonstrates how the difference between penalties imposed by school districts and administrative agencies can be subject to litigation. An appellate court held the Commissioner of Education did not abuse his discretion by refusing to increase the one-and-one-half year suspension of a physical education teacher.[94] The court rejected the district's argument that the penalty, based on improper remarks and physical contact that the teacher had with female students, should have been harsher.

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[91] Coleman v. Orleans Parish Sch. Bd., 688 So. 2d 1312 [116 Educ. L. Rep. 1291] (La. Ct. App. 1997).

[92] School Comm. of Brockton v. Civil Serv. Comm'n, 684 N.E.2d 620 [120 Educ. L. Rep. 1144] (Mass. Ct. App. 1997).

[93] Wright v. Mead Sch. Dist. No. 354, 944 P.2d 1, 4 [121 Educ. L. Rep. 312] (Wash. Ct. App. 1997).

[94] Board of Educ. of Greenburgh Cent. Sch. Dist. No. 7, 654 N.Y.S.2d 458 [116 Educ. L. Rep. 766] (N.Y. App. Div. 1997).

Conversely, an appellate court in Texas reversed the Commissioner of Education and reinstated the school board's termination of a teacher's contract due to immorality.[95] The court found that the Commissioner erred by performing a de novo review rather than conducting one based on substantial evidence.

A case from California illustrates how evidentiary rules can come into play in discipline cases. An appellate court affirmed the dismissal of a custodian who had sexual intercourse with a fifteen-year-old student.[96] In distinguishing between a declaration against interest that is inadmissible over an objection in a civil action and a confession, the court offered that the custodian's statements to the arresting officer amounted to a confession because they acknowledged the elements of the crime of unlawful sexual intercourse with a minor. As such, the court agreed that since the statements constituted a confession, the hearing officer properly relied on them in recommending the custodian's dismissal.

A case from Michigan reveals that the relationship between immorality and unfitness to teach can be critical. An appellate court upheld the dismissal of a teacher who pled guilty to embezzling $10,000-$15,000 from an employer outside of the school district. The court followed the presumption that a person who is convicted of a crime involving moral turpitude is unfit to teach. The court concluded that since the teacher "failed to rebut the presumption with evidence that his continued employment did not affect his students, their parents, his peers, his position as a role model, and the reputation of the school,"[97] his dismissal was warranted.

Incompetence

Four cases that upheld disciplinary action for incompetence involved financial matters. The Supreme Court of Alaska affirmed the termination of a superintendent's contract for misleading his board about the amount of additional compensation that he was entitled to and how he would use the funds to buy back years in the teachers' retirement system.[98] The court reasoned that since the superintendent's conduct amounted to a breach of fiduciary duty, it supported his dismissal for incompetence.

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[95] Ysleta Indep. Sch. Dist. v. Meno, 933 S.W.2d 748 [114 Educ. L. Rep. 694] (Tex. Ct. App. 1996).

[96] Ashurst v. Monterey Peninsula Unified Sch. Dist., 67 Cal.Rptr.2d 316 [120 Educ. L. Rep. 744] (Cal. Ct. App. 1997).

[97] Satterfield v. Board of Educ. of the Grand Rapids Pub. Schs., 556 N.W.2d 888, 889 [114 Educ. L. Rep. 1192] (Mich. Ct. App. 1996).

[98] Kilmer v. Dillingham City Sch. Dist., 932 P.2d 757 [116 Educ. L. Rep. 794] (Alaska 1997).

An appellate court in Florida upheld a school board's rejection of a hearing officer's order to reinstate a former associate superintendent of planing and operations.[99] The board demoted the ex-associate superintendent to a middle school principal largely for failing to oversee building projects and receiving gratuities from vendors with whom it had contracted. The court agreed the board's position was supported by substantial evidence of blatant and glaring impropriety.

In the first of two cases from New York, an appellate court affirmed a hearing officer's adjudication of incompetence against a school business administrator.[100] The court decided that the administrator not only failed to stop the board president from misusing the district's credit card but also authorized the payment of the president's personal expenses from public funds. However, the court modified the administrator's penalty from dismissal to a two-month suspension without pay.

Another appellate court in New York upheld the termination of a cashier's contract for misconduct and incompetence.[101] The court noted that the cashier neither recorded numerous purchases of milk and juice by a kindergarten class nor adult food purchases along with failing to account for preidentified bills.

As illustrated by a decision from the Supreme Judicial Court of Appeals of West Virginia, a party can claim that a discharge for incompetence is a form of retaliation. The court affirmed a bus driver's dismissal for failing to follow safety procedures when her bus broke down along a highway.[102] The court rejected the driver's claim because it was of the opinion that even though she had a history of filing grievances, the board's charges of specific safety violations constituted a legitimate, non-retaliatory motive that she was unable to refute.

The Supreme Court of Connecticut upheld the dismissal of a teacher whose school board found that she was incompetent to teach in two of three subject matter areas for which she was certified.[103] The court agreed that since the state's tenure law permitted the board to examine the teacher's overall competence, she could be fired.

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[99] Schrimsher v. School Bd. of Palm Beach County, 694 So. 2d 856 [118 Educ. L. Rep. 1265] (Fla. Dist. Ct. App. 1997).

[100] Weatherlow v. Board of Educ. of Jamestown City Sch. Dist., 653 N.Y.S.2d 778 [116 Educ. L. Rep. 351] (N.Y. App. Div. 1997).

[101] Stewart v. Board of Educ. of Saratoga Springs Sch. Dist., 656 N.Y.S.2d 541 [117 Educ. L. Rep. 1099] (N.Y. App. Div. 1997).

[102] Conner v. Barbour County Bd. of Educ., 489 S.E.2d 787 [120 Educ. L. Rep. 843] (W. Va. 1997).

[103] Sekor v. Board of Educ. of Town of Ridgefield, 689 A.2d 1112 [116 Educ. L. Rep. 1049] (Conn. 1997).

School employees were successful in two cases where boards sought to discharge them for incompetence. The Supreme Court of Nebraska affirmed the reinstatement of a superintendent.[104] The court held that the board of education failed to substantiate a charge of incompetence against the superintendent that he allegedly made errors on draft budget documents and failed to file a single Chapter I funding request.

The Supreme Court of Pennsylvania confirmed an arbitrator's reinstatement of an auto mechanics instructor who was fired for incompetence where a school failed to follow the rating procedures required by state law.[105] In rejecting the school's argument that the law did not apply under the collective bargaining agreement, the court maintained that the statutory savings clause in the contract assured employees of their statutory rights.

Compliance with School Board Policies and State Statutes

As reflected in a case from New York, the relationship between state legislatures and school officials can play a major role in litigation. A trial court reversed a veto by the Chancellor of New York City's public schools in a dispute over a community school board's authority to select a superintendent.[106] The court declared that since state law entrusts boards with the sole authority to choose superintendents, the Chancellor's effort to make selection a joint process violated public policy.

In Tennessee, an appellate court upheld the authority of the legislature to replace elected county superintendents with directors who are appointed by local boards of education.[107] The court judged that the legislature always has the right to abolish offices that it has created.

A case from Connecticut demonstrates the importance of time limits in personnel decisions. An appellate court affirmed the nonrenewal of a teacher's contract due to budget reductions even though the board did not strictly follow the statutory time frame in convening a hearing panel.[108] Insofar as the court treated the time limits as directory rather than mandatory, it contended that the board's failure to adhere to the statutory dates was not a fatal defect.

In Arkansas, a principal successfully sought further review of the denial of her request for attorney fees.[109] An appellate court posited that the principal, who was reinstated because he did not receive a hearing within the time required in the Teacher Fair Dismissal Act, was entitled to attorney fees.

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[104] Boss v. Fillmore Sch. Dist. No. 19, 559 N.W.2d 448 [116 Educ. L. Rep. 380] (Neb. 1997).

[105] Juniata-Mifflin Counties Area Vocational-Technical Sch. v. Corbin, 691 A.2d 924 [117 Educ. L. Rep. 633] (Pa. 1997).

[106] Maldonado v. Crew, 652 N.Y.S.2d 487 [115 Educ. L. Rep. 433] (N.Y. Sup. Ct. 1996).

[107] County of Shelby v. McWherter, 936 S.W.2d 923 [115 Educ. L. Rep. 553] (Tenn. Ct. App. 1996).

[108] Harhay v. Board of Educ. of Ellington, 867 A.2d 1313 [115 Educ. L. Rep. 974] (Conn. Ct. App. 1997).

[109] Hall v. Kingsland Sch. Dist., 938 S.W.2d 571 [116 Educ. L. Rep. 510] (Ark. Ct. App. 1997).

A case from Texas shows how exhaustion of administrative remedies can influence court decisions. An appellate court affirmed a grant of summary judgment in favor of a school district in a dispute where a former employee alleged that she was fired in retaliation for filing a worker's compensation claim.[110] The court stated that the claimant's failure to pursue her administrative remedies meant that it lacked jurisdiction.

According to the Supreme Court of Nebraska, probationary teachers are entitled to specific statutory rights. The court upheld the reinstatement of a probationary teacher whose contract was not renewed on the ground that administrators failed to comply with a state law that requires them to provide her with an in-classroom observation evaluation at least once per semester. In narrowly interpreting its statute, the court ruled that an observation that took place two weeks after the semester was over did not satisfy the law.[111]

In a case of first impression, an appellate court in Michigan affirmed a grant of summary judgment in favor of a school district over whether it was required to provide an individualized development plan to a probationary teacher whose contract was not renewed at the end of his first year of employment.[112] The court indicated that the teacher was not entitled to the statutory protection because he was not rehired due to his unsatisfactory performance in his first year.

The following five cases emphasized the importance of notice. The Supreme Court of Kentucky affirmed that an associate director of special education who was demoted to a teaching position received appropriate oral notice of the superintendent's decision.[113] The court added that the superintendent's failure to set the time, place, and date for a hearing was not fatal because the former director later requested, and received, a twenty-five day continuance.

The Supreme Court of Arkansas decreed that attorney fees are available for educators who prevail in claims under the state's Teacher Fair Dismissal Act. As such, the court reversed and remanded in favor of a replacement teacher who had not received notice that her contract would not be renewed.[114] The court determined both that she was entitled to compensation and to a determination as to whether she should receive attorney fees.

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[110] Washington v. Tyler Indep. Sch. Dist., 932 S.W.2d 686 [114 Educ. L. Rep. 683] (Tex. Ct. App. 1996).

[111] Cox v. York County Sch. Dist. No. 083, 560 N.W.2d 138 [116 Educ. L. Rep. 781] (Neb. 1997).

[112] VanGessel v. Lakewood Pub. Schs., 558 N.W.2d 248 [115 Educ. L. Rep. 496] (Mich. Ct. App. 1997).

[113] Estriecher v. Board of Educ. of Kenton County, 950 S.W.2d 839 [120 Educ. L. Rep. 1234] (Ky. 1997).

[114] Love v. Smackover Sch. Dist., 946 S.W.2d 676 [119 Educ. L. Rep. 728] (Ark. 1997).

Similarly, the Supreme Court of Arkansas ordered the reinstatement of a teacher whose school district failed to comply with the statute which mandates that educators who do not receive notice of nonrenewal by May 1 are automatically rehired for the next year.[115] The court added that the district could not use conduct from the prior year as grounds for discharge.

An appellate court in Alabama affirmed in favor of a board of education that informed a nontenured teacher on the day after the school year ended for students but not for staff, that her contract would not be renewed.[116] The court found that the teacher received timely notice because state law requires it to be delivered before the end of the school year in which the teacher is employed.

In Michigan, an appellate court rejected a district's claim that an interim replacement third grade teacher on a one-year contract was not covered by the state's Teacher Tenure Act. The court asserted that even though the one-year agreement included language stating that the teacher had no expectation of continuing employment, the Act's provision of continued employment overrode the contract. The court concluded that since the teacher had not been notified in writing that her contract would not be renewed at least sixty days before the close of the school year, she was reemployed for the following year.[117]

Hearings are an important feature of most employement statutes. The Supreme Court of Alabama reversed in favor of non-teaching employees who served as both custodians and lunchroom workers.[118] In ascertaining that the workers were permanent employees under the state's Fair Dismissal Act, the court decided that the board erred in denying their requests for hearings prior to their dismissals. The court reasoned that the board should have added the total number of hours that each employee worked rather than rely on the amount of time served in each position.

A principal in Louisiana unsuccessfully argued that he was entitled to an injunction that would have prevented a member of the school board from testifying at his dismissal hearing.[119] An appellate court rejected the principal's argument that the board member should not have been permitted to testify since he was a friend of the superintendent who lodged the formal charges. The court offered that since a school board is the only public body authorized to conduct dismissal hearings, the participation of board members could not be prohibited in advance.

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[115] Hannon v. Armorel Sch. Dist. No. 9, 946 S.W.2d 950 [119 Educ. L. Rep. 731] (Ark. 1997).

[116] Kirkland v. Davis, 682 So. 2d 1366 [114 Educ. L. Rep. 978] (Ala. Civ. App. 1996).

[117] Watts v. Ann Arbor Pub. Schs., 561 N.W.2d 851 [117 Educ. L. Rep. 732] (Mich. Ct. App. 1997).

[118] Green v. Etowah County Bd. of Educ., 689 So. 2d 838 [117 Educ. L. Rep. 380] (Ala. 1997).

[119] Bell v. Tensas Parish Sch. Bd., 691 So. 2d 234 [117 Educ. L. Rep. 800] (La. Ct. App. 1997).

In Missouri, an appellate court upheld a school board's convening a hearing to dismiss a probationary teacher during his first year on the job after it discovered that he had been convicted of indecent exposure prior to signing his contract. In rebuffing the argument that state law permitted termination hearings only for tenured teachers, the court reflected that "[a] school board is entitled to hold a termination hearing even though there is no explicit statutory requirement."[120]

A case from Pennsylvania reflects how state statutes can address appeals. An appellate court affirmed a superintendent's suspension of a nonprofessional employee without pay for two days when it disagreed with her argument that his action was an 'adjudication" within the meaning of a state statute.[121] The court noted that since the statute applied only to local agencies, it did not cover the superintendent.

In a case with possibly far reaching implications, the Supreme Court of Hawaii maintained that the stress-related injury that a teacher suffered after she was punished for violating the school board's policy against corporal punishment was covered by state's worker's compensation law.[122] In reviewing other state laws that expressly excluded stress claims, the court thought that, regardless of their expense, stress-related injuries would be a cost of doing business in Hawaii unless specifically excluded by statute.

The Supreme Court of Arkansas showed how state laws can impact the extent to which the contracts of employees can be terminated or continued. In a narrow reading of the state's Teacher Fair Dismissal Act, the court upheld the reinstatement a school counselor's contract.[123] Although the Act requires a school board to vote separately on each ground for terminating an employee's contract, the court observed that the board violated the law by approving all four reasons at one time. The court added that since the board violated the Act, the counselor was entitled to a contract renewal.

The Supreme Court of Alabama affirmed a breach of contract claim entered on behalf of a teacher who was dismissed after three days because the district did not receive sufficient funding for his job. Even though the superintendent had not complied with state law by formally nominating the teacher for his job, the court upheld an award of equitable estoppel because the superintendent and the board withheld the material fact that the job was contingent on state funding.[124]

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[120] C.F.S. v. Mahan, 934 S.W.2d 615, 618 [114 Educ. L. Rep. 973] (Mo. Ct. App. 1996).

[121] Lesome v. Arena, 688 A.2d 802 [116 Educ. L. Rep. 303] (Pa. Commw. Ct. 1997).

[122] Mitchell v. State of Hawaii, Dep't of Educ., 942 P.2d 514 [120 Educ. L. Rep. 591] (Hawaii 1997).

[123] Nettleton Sch. Dist. v. Owens, 948 S.W.2d 94 [119 Educ. L. Rep. 1258] (Ark. 1997).

A case from California reflects how state law can influence which factors can be used in making employment decisions. An appellate court confirmed a monetary award and attorney fees in favor of an assistant principal who was demoted to teacher.[125] The court acknowledged that district officials violated the law by relying on an arrest record that did not result in a conviction.

Reduction-in-Force and Involuntary Leaves of Absence

Reorganization or consolidation of a school system, declining enrollment, or fiscal restraints may require a board to initiate a RIF. As illustrated by the cases in this section, the sufficiency of the reasons for a RIF, which employees can be laid off, the realignment or reassignment of staff members, and call-back rights are ordinarily governed by state tenure statutes, local board policies, and collective bargaining agreements.

In Illinois, an appellate court rejected a former custodian's breach of contract claim that a school district's failure to give him sixty days' notice before it merged with another system violated state law.[126] The court pointed out that insofar as the statutory provision does not create a duty to notify when a district is dissolved in a merger, the custodian's yearly contract devolved into an employment-at-will situation. Consequently, the court was of the opinion that the breach claim was without merit.

Necessity for Reduction-in-Force

The Supreme Court of Idaho reversed a school board's attempt to RIF a nontenured teacher when it eliminated a home economics program.[127] The court declared that although the board followed the RIF provisions in its collective bargaining agreement, the teacher was deemed reemployed because it failed to provide her with notice prior to the statutory deadline.

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[124] Talladega City Bd. of Educ. v. Yancy, 682 So. 2d 33 [114 Educ. L. Rep. 707] (Ala. 1996).

[125] Faria v. San Jacinto Unified Sch. Dist., 59 Cal.Rptr.2d 72 [114 Educ. L. Rep. 569] (Cal. Ct. App. 1996).

[126] Spear v. Board of Educ. of N. Shore Sch. Dist. No. 112, 683 N.E.2d 218 [120 Educ. L. Rep. 759] (Ill. App. Ct. 1997).

[127] Hunting v. Clark County Sch. Dist. No. 161, 931 P.2d 628 [116 Educ. L. Rep. 422] (Idaho 1997).

Elimination of Position

In a novel case, an appellate court in Louisiana upheld the constitutionality of a law that permitted school boards to adopt and implement policies and procedures for reducing the work force of their non-teaching employees.[128] The court rejected the argument of a board employee with the title of Textbook Coordinator that the statutory classification violated the equal protection clause in the state constitution. The court responded that the law achieved the rational purpose of furthering the government's interest in keeping the instructional function of education continuing.

Selection of Employees

The most frequently litigated issue in this section involved the use of seniority in identifying employees for a RIF. A tenured school psychologist in Connecticut whose contract was terminated due to declining enrollment unsuccessfully challenged the board's overriding her seniority and retaining a junior staff member.[129] The appellate panel stated that since the psychologist failed to exhaust administrative remedies under the state's Teacher Tenure Act, the trial court correctly determined that it lacked subject matter jurisdiction to review the board's action.

An appellate court in Arkansas refused to overturn a school board's decision to RIF a Chapter I high school teacher who had more experience that three elementary Chapter I teachers.[130] The court held that the policy over the selection of employees to be retained in a RIF was sufficiently flexible to permit a review of candidates based on skills and ability rather than just seniority.

In Minnesota, an appellate court affirmed that a school board could place a business education teacher on unrequested leave where all vacant positions were filled by more senior teachers.[131] The court added that since the furloughed teacher was licensed in only one subject, he could not bump a less senior colleague to teach in another area.

A case from the Supreme Court of Nebraska illustrates how a determination of personnel to be reduced can involve questions of calculating part-time teaching credits. The court upheld a school district's furlough of a full-time rather than a part-time teacher after an amendment to state law permitted part-time faculty to apply their years of service on a pro rata basis toward permanent certification.[132] The court posited that insofar as the legislature had not prohibited retroactive application of the law, and all eleven of the part-time teacher's years of experience could be used in calculating her eligibility for the RIF, she could be retained because she had the equivalent of more full-time service.

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[128] Lewis v. Roemer, 696 So. 2d 252 [119 Educ. L. Rep. 747] (La. Ct. App. 1997).

[129] Murphy v. Young, 692 A.2d 403 [117 Educ. L. Rep. 1073] (Conn. Ct. App. 1997).

[130] Spainhour v. Dover Sch. Dist., 943 S.W.2d 610 [118 Educ. L. Rep. 530] (Ark. Ct. App. 1997).

[131] DeGeorgeo v. Independent Sch. Dist. No. 833, S. Washington County, 563 N.W.2d 755 [118 Educ. L. Rep. 769] (Minn. Ct. App. 1997).

In Arkansas, a part-time teacher was restored to a full-time position where her school district failed to follow the state's Teacher Fair Dismissal Act.[133] An appellate court judged that since the superintendent used only two of thirteen enumerated criteria in selecting employees for the RIF due to the district's reduction in funding, the teacher was entitled to keep her job.

Realignment/Reassignment

In a case of first impression in Ohio, an appellate court ruled that only the income a teacher earned after he was wrongfully discharged as part of a RIF had to be deducted as mitigated damages in an award for back pay.[134] The court decided that since the teacher lawfully could have continued to work evenings and summers while employed by his district, those earnings could not be deducted from a final award for back pay.

An appellate court in New York affirmed a determination in favor of a teacher who was improperly subject to a RIF.[135] The court found that the school district did not have a rational basis for assigning courses to a probationary teacher since the qualified tenured teacher was on its preferred eligibility list.

Call-Back Rights

According to the Supreme Court of Appeals of West Virginia, a teacher on furlough is entitled to be recalled to an open position that occurs when the contract teacher will be absent twenty or more consecutive days. Here an educator filed one-time applications for eight separate, but consecutive, ten-day leaves of absence, thereby creating an opening for which the plaintiff, a senior furloughed teacher, was qualified. Reversing in favor of the furloughed teacher, the court stated that a school board's duty to issue a recall notice does not depend on a single request for a leave of absence of twenty days or more.[136]

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[132] Nickel v. Saline County Sch. Dist. No. 163, 559 N.W.2d 480 [116 Educ. L. Rep. 393] (Neb. 1997).

[133] Junction City Sch. Dist. v. Alphin, 938 S.W.2d 239 [116 Educ. L. Rep. 499] (Ark. Ct. App. 1997).

[134] Cuyahoga Falls Educ. Ass'n v. Cuyahoga Falls Sch. Dist Bd. of Educ., 678 N.E.2d 976 [117 Educ. L. Rep. 1114] (Ohio Ct. App. 1996).

[135] Taber v. Sherburne-Earlville Cent. Sch. Dist., 663 N.Y.S.2d [121 Educ. L. Rep. 1129] (N.Y. App. Div. 1997).

An appellate court in New York affirmed that a furloughed tenured teacher was entitled to the statutory seven-year period of preferred eligibility for full-time reemployment.[137] The court indicated that the seven-year provision applies to furloughs from full-time and part-time positions. The court concluded that the teacher, who was furloughed from her full-time job in 1988, but re-hired to a part-time position in 1994-95, had a new seven-year period of eligibility beginning in 1995.

Contract Disputes

Among the many types of problems that can arise concerning employment contracts are the inclusion of ancillary administrative, collective bargaining, and other provisions, as well as questions regarding breach. Like other legally binding agreements, an employment contract requires an offer, consideration, and acceptance.

Board Policies and Contract Stipulations

A case from New Mexico illustrates how the elements of a contract are ripe for litigation. An appellate court affirmed that a nontenured teacher who received a written memorandum from his supervisors stating that they intended to recommend his reemployment did not have an enforceable contract simply because he accepted their offer.[138] The court asserted that insofar as only the school board can provide an offer to reemploy, and it had not done so, the teacher was without a contract.

In Kansas, an appellate court affirmed that a negotiated contract settlement that resulted in a five-day reduction in extended duty days and an accompanying decrease in salary did not amount to the nonrenewal of a teacher's contract so as to invoke statutory notice and due process procedures.[139] The court contended that nonrenewal means severance of an employment relationship at the end of a school year, a situation that was not present in the case at bar.

Contracts involve a variety of questions over compensation. The first two of three cases from the Supreme Court of Ohio reached seemingly divergent results in pay matters dealing with tutors. In the first, the court affirmed that a school district was not required to pay tutors the same salary as classroom teachers. The court reasoned that the tutors, who performed the duties of educational aides, are not certificated teachers.[140] Conversely, the court upheld a grant of mandamus directing another district to pay tutors at the same rate as teachers.[141] The court was of the opinion that the collective bargaining agreement defined tutors with teaching certificates as teachers for the purposes of the state's salary statutes. The court ascertained that a writ of mandamus was appropriate since the tutors were not members of the bargaining unit and had no access to the grievance procedure.

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[136] State *ex rel.* Serdich v. Preston County Bd. of Educ., 488 S.E.2d 34 [119 Educ. L. Rep. 1247] (W. Va. 1997).

[137] Avila v. Board of Educ. of N. Babylon Union Free Sch. Dist., 658 N.Y.S.2d 703 [119 Educ. L. Rep. 205] (N.Y. App. Div. 1997).

[138] Giangreco v. Murlless, 943 P.2d 532 [120 Educ. L. Rep. 822] (N.M. Ct. App. 1997).

[139] Baldwin v. Board of Educ., Unified Sch. Dist. No. 418, 930 P.2d 18 [115 Educ. L. Rep. 517] (Kan. Ct. App. 1996).

The Supreme Court of Ohio reversed a writ of mandamus in favor of a teacher whose salary step increase was withdrawn by her school board.[142] The court noted that since the board mistakenly awarded the increase based on a year's service as a substitute teacher, it had the authority to remedy its error.

In another case from Ohio, an appellate court reversed in favor of a bus driver in a dispute over whether a statute governing uniform salary schedules for nonteaching employees applied to service credit.[143] The court decreed that the factors the school district relied on in distinguishing between "as-needed" and "long-term" substitutes established a nonuniform pay schedule that violated statute.

A school board in Louisiana sought further review of a judgment that awarded back pay to a public school accountant who filled an interim job for two years before returning to a lower position with less pay. An appellate court reversed in favor of the board.[144] The court offered that since the accountant voluntarily agreed to accept less pay, the law prohibiting reduction of salaries did not apply to jobs with different responsibilities.

In New York, a former school administrator unsuccessfully challenged the dismissal of his suit for reinstatement and back pay.[145] An appellate court affirmed that the administrator did not have a right to a hearing over his claim to retroactive pay since he failed to request one within the appropriate statutory limit after he learned that he was not going to get his job back.

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[140] State *ex rel.* Fleming v. Rocky River Bd. of Educ., 680 N.E.2d 981 [119 Educ. L. Rep. 229] (Ohio 1997).

[141] State *ex rel.* Kabert v. Shaker Heights City Sch. Dist. Bd. of Educ., 676 N.E.2d 101 [116 Educ. L. Rep. 359] (Ohio 1997).

[142] State *ex rel.* Walker v. Lancaster City Sch. Dist. Bd. of Educ., 680 N.E.2d 993 [119 Educ. L. Rep. 234] (Ohio 1997).

[143] Streetsboro Sch. Support Personnel Ass'n v. Streetsboro City Sch. Dist. Bd. of Educ., 680 N.E.2d 1302 [119 Educ. L. Rep. 248] (Ohio Ct. App. 1996).

[144] Trouard v. Orleans Parish Sch. Bd., 695 So. 2d 524 [119 Educ. L. Rep. 304] (La. Ct. App. 1997).

[145] Chanecka v. Board of Educ. Broome-Tioga BOCES, 663 N.Y.S.2d 681 [121 Educ. L. Rep. 1121] (N.Y. App. Div. 1997).

A case from Louisiana reflects how board policies can influence litigation. An appellate court upheld a board member's right to recover payment of leave time that he accrued but had not used before his retirement.[146] Despite the existence of an unwritten policy that employees were not entitled to compensation for unused leave, the court permitted it here because the rule was neither well known nor routinely followed.

In Alabama, an appellate court granted a senior teacher's request for a writ of mandamus preventing his board from transferring him to another school.[147] The court observed that the board ignored its own policy of relying on system-wide seniority in making transfers.

A substitute teacher in New York unsuccessfully sought further review of his dismissal prior to the end of the school year.[148] An appellate court agreed that the teacher was not entitled to administrative review during the year because, even if he had such a right under his collective bargaining agreement, it was not included in the board's by-laws.

In Tennessee, a union challenged a school board's policy of limiting the amount of service credit for newly employed teachers to five years.[149] An appellate court affirmed that such a limitation was lawful.

Breach of contract actions arise when employees believe that schools have not complied with the terms of their contracts. For example, an appellate court in New York affirmed that a teacher in a Catholic school with a one-year contract did not have a cause of action for breach when her contract was not renewed.[150] The court pointed out that the "good cause" provision in the teacher's contract applied only to its termination during the school year. However, the court refused to dismiss the teacher's allegation that her contract was not renewed because she belonged to a union.

A second case from New York involved a school district's challenge to the denial of its motion to dismiss a complaint by a tenured teacher who filed a breach of contact action after settling a grievance prior to going to arbitration. An appellate court reversed in favor of the district.[151]

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[146] Baudoin v. Vermilion Parish Sch. Bd., 692 So. 2d 1316 [118 Educ. L. Rep. 552] (La. Ct. App. 1997).

[147] Alabama State Tenure Comm'n v. Jackson County Bd. of Educ., 698 So. 2d 775 [120 Educ. L. Rep. 1248] (Ala. Civ. App. 1996).

[148] Matter of Schumann v. Cortinez, 653 N.Y.S.2d 138 [115 Educ. L. Rep. 1010] (N.Y. App. Div. 1997).

[149] Knox County Educ. Ass'n v. Knox County Bd. of Educ., 953 S.W.2d 686 [121 Educ. L. Rep. 1198] (Tenn. Ct. App. 1997).

[150] Muhitch v. St. Gregory the Great Roman Catholic Church and Sch., 659 N.Y.S.2d 679 [119 Educ. L. Rep. 632] (N.Y. App. Div. 1997).

[151] Kleinmann v. Bach, 657 N.Y.S.2d 525 [118 Educ. L. Rep. 722] (N.Y. App. Div. 1997).

The court declared that the state law that made signed, written agreements binding on the parties applied to stipulations that were entered into as part of a grievance process.

In Texas, an appellate court vacated a damages award entered on behalf of a teacher who was allegedly denied reinstatement after her pregnancy since she failed to exhaust administrative remedies.[152] The court posited that factual questions over whether the district terminated the teacher's contract or she voluntarily abandoned her position had to be addressed administratively before she could file an action for breach.

Administrative Regulations and Statutory Provisions

The most frequently litigated subject in this area involves pensions and retirement plans.[153] The First Circuit reversed a trial court ruling over changes in Maine's pension laws. The court found that even though the amendments reduced benefits, the law did not violate the Contract Clause because the public school teachers who challenged the statutory modifications were neither retired nor receiving benefits.

The Supreme Court of South Carolina upheld a school district's denial of a lump sum retirement incentive bonus to a former staff member who did not meet its twelve-month employment requirement.[154] The court held that even though the twelve-month rule was not part of the statute authorizing retirement bonuses, the provision was permissible because it merely addressed an area on which the law was silent.

In the first of two actions from Pennsylvania, an appellate court affirmed an adjudication of the Public School Employees' Retirement Board that the civilian work performed by a conscientious objector in lieu of induction into the armed services did not constitute military service.[155] The court rejected the employee's argument that his work, performed pursuant to his Quaker faith, should have substituted for military service for the purposes of eligibility to purchase additional retirement credit.

An appellate court reversed in favor of a school district in maintaining that an amendment to Pennsylvania's pension law, which provided retroactive benefits to employees who retired with more than thirty years of service, did not apply to a former teacher who received a one-time retirement payment.[156] The court reflected that the amendment did not change the collective bargaining agreement under which the teacher had accepted the benefits.

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[152] Mercedes Indep. Sch. Dist. v. Munoz, 941 S.W.2d 215 [117 Educ. L. Rep. 373] (Tex. Ct. App. 1997).

[153] Parker v. Wakelin, 123 F.3d 1 [120 Educ. L. Rep. 966] (1st Cir. 1997).

[154] Wright v. Richland County Sch. Dist. Two, 486 S.E.2d 740 [119 Educ. L. Rep. 706] (S.C. 1997).

[155] Worley v. Pennsylvania Pub. Sch. Employees' Retirement Bd., 689 A.2d 334 [116 Educ. L. Rep. 684] (Pa. Commw. Ct. 1997).

In New York, an appellate court permitted a teacher to participate retroactively in the State Teachers Retirement System.[157] As such, the court reversed in favor of the teacher because she was able to prove that she had not participated in the procedure that should have informed her of her right to join the system when she was first hired as a substitute.

A case from Pennsylvania illustrates how laws pertaining to salary and service credit can affect other litigation. An appellate court reversed in favor of a school district in a dispute over whether it had to award back pay to long term substitutes who had been placed on the improper salary steps.[158] The court acknowledged that the state's School Code did not compel an award of back pay where the teachers' salaries exceeded the law's minimum requirements.

The Supreme Court of Appeals of West Virginia affirmed the denial of seniority credit to a teacher's aide for a period of previous employment. The court determined that even though the service credit, which had been awarded mistakenly, permitted the aide to survive a RIF, the district was not estopped from correcting its clerical error.[159]

An appellate court in Florida reversed a decision that had required a juvenile who phoned a false bomb threat to reimburse a district for the cost of teacher and administrative staff salaries resulting from the forced evacuation of a school.[160] The court stated that since the educators received their salaries in spite of the evacuation, reimbursement was unnecessary because the district had not incurred an increased financial burden.

Tenure

Tenure Status

The Supreme Court of Rhode Island upheld the denial of tenure to probationary teachers who had excessive absences.[161] The court asserted both that the years in which the teachers missed more than twenty-seven days did not count toward tenure and that the time lost to tenure eligibility due to excessive absences did not restart the probationary period.

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[156] Danville Area Sch. Dist. v. Danville Area Educ. Ass'n, PSEA/NEA, 700 A.2d 549 [121 Educ. L. Rep. 246] (Pa. Commw. Ct. 1997).

[157] Gregory v. Bemus Point Cent. Sch. Dist., 654 N.Y.S.2d 502 [116 Educ. L. Rep. 772] (N.Y. App. Div. 1997).

[158] Penns Manor Area Sch. Dist. v. Penns Manor Area Educ. Ass'n, 697 A.2d 610 [120 Educ. L. Rep. 212] (Pa. Commw. Ct. 1997).

[159] Hazelwood v. Mercer County Bd. of Educ., 488 S.E.2d 480 [120 Educ. L. Rep. 328] (W. Va. 1997).

[160] B.D.A. v. State of Fla., 695 So. 2d 399 [119 Educ. L. Rep. 292] (Fla. Dist. Ct. App. 1997).

[161] Asadoorian v. Warwick Sch. Comm., 691 A.2d 537 [117 Educ. L. Rep. 220] (R.I. 1997).

According to the Supreme Court of New Jersey, an educator with supervisory and administrative certificates could not transfer his tenure from the former to the latter.[162] The court concluded that tenure has to be earned separately in each area.

Relying on the statute which provides that service as a "regular substitute" can be applied to tenure, New York's Court of Appeals reversed in favor of a teacher.[163] In reasoning that the teacher, who served most of one year as a per-diem instructor, should have received credit toward tenure, the court was of the opinion that the length of service should be defined by the actual nature and continuity of the substitute teaching, not the anticipated duration of the replaced teacher's absence.

In a second case from New York, an appellate court affirmed that a school board was the appropriate body to judge whether a computer science teacher on furlough should be awarded tenure.[164] Insofar as the teacher was originally tenured in an improper category, the court agreed that the correct action was to remand the dispute to the board to examine her duties and assign her to the right area rather than order her immediate reinstatement.

Tenure by Default or Acquiescence

The Supreme Court of Ohio upheld a judgment in favor of tutors who sought continuing contracts with salaries that were consistent with their collective bargaining schedules.[165] The court agreed that such relief was not inequitable since tutors met the certification requirements of teachers, performed their services over three consecutive years, and neither the school board nor the superintendent gave them written notice that they would be recommended for limited contracts.

In a case from Kansas, the Tenth Circuit affirmed that a teacher could not rely on an implied contract as the basis for making himself a tenured employee for purposes of establishing a property interest. The court noted that even though the district designated the teacher as certificated and evaluated his performance for eight years, this did not substitute for the unambiguous legislative requirements regarding tenure. The court added that since educators are presumed to have knowledge of the statutory limitations on the granting of tenure, "any contract created in contravention of the teacher contracting statutes is ultra vires and void."[166]

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[162] Nelson v. Board of Educ. of the Township of Old Bridge, 689 A.2d 1342 [116 Educ. L. Rep. 1062] (N.J. 1997).

[163] Speichler v. Board of Cooperative Educ. Servs., Second Supervisory Dist., 659 N.Y.S.2d 199 [119 Educ. L. Rep. 614] (N.Y. 1997).

[164] Abrantes v. Board of Educ. of the Norwood-Norfolk Cent. Sch. Dist., 649 N.Y.S.2d 957 [114 Educ. L. Rep. 608] (N.Y. App. Div. 1996).

[165] State *ex rel.* Cohn v. Shaker Heights City Sch. Dist. Bd. of Educ., 678 N.E.2d 1385 [118 Educ. L. Rep. 445] (Ohio 1997).

Certification

A disgruntled applicant for a high school principalship unsuccessfully sought further review of a district's decision to hire an applicant who completed the requirements for certification but did not have the certificate in hand.[167] The Supreme Judicial Court of Appeals of West Virginia indicated that the state permitted districts to interview and hire applicants who completed the appropriate requirements but did not yet possess their certificates.

In California, a union successfully challenged the Commissioner of Education's attempt to require studio teachers to have both elementary and secondary certificates rather than the more recent multiple subject matter credentials.[168] The court decreed that since the credentialing requirement did not change for studio teachers, the Commissioner's refusal to meet the appropriate standard amounted to issuing a new regulation without following the state's administrative code.

An appellate court in Illinois overturned a board's replacement of certified school nurses with less expensive registered nurses who lacked school service personnel certificates.[169] The court ruled that while nothing in state law required districts to hire nurses to provide health services, they had to employ individuals who were certified if they chose to do so.

In Ohio, a teacher unsuccessfully sought further review of the denial of her request for an early education handicapped certificate under a "grandfather" provision on the basis that her experience was in grades two and three.[170] The court found that limiting the "grandfather" provision to teaching experience in pre-kindergarten was reasonable.

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[166] Mangum v. Unified Sch. Dist. No. 328, 125 F.3d 1353, 1357 [121 Educ. L. Rep. 511] (10th Cir. 1997).

[167] Keatley v. Mercer County Bd. of Educ., 490 S.E.2d 306 [120 Educ. L. Rep. 1202] (W. Va. 1997).

[168] Motion Picture Studio Teachers and Welfare Workers v. Millan, 59 Cal.Rptr. 608 [114 Educ. L. Rep. 911] (Cal. Ct. App. 1996).

[169] Brady v. Board of Educ. of Palatine Community Consol. Sch. Dist., 672 N.E.2d 810 [114 Educ. L. Rep. 917] (Ill. App. Ct. 1996).

[170] State *ex rel.* DeMuth v. State Bd. of Educ., 680 N.E.2d 1314 [119 Educ. L. Rep. 252] (Ohio Ct. App. 1996).

Decertification, Revocation, or Suspension

The Supreme Court of Georgia upheld the state's statutory scheme for decertifying teachers who were discharged for misconduct.[171] The court agreed that insofar as tenure creates a protectable property interest and the law that calls for hearings before the State Practices Commission permits the panel to recommend the removal of a teacher's certification, the statute satisfied due process.

In Florida, a teacher successfully challenged an order of the State Education Practices Commission that would have retroactively revoked his certificate for five years to the date when he first engaged in a sexual relationship with a minor student.[172] The court pointed out that making the revocation retroactive to prior to when the relationship was discovered or the teacher resigned was illogical, arbitrary, capricious, and an abuse of discretion.

An appellate court in Connecticut affirmed the revocation of a teacher's certificate where the evidence demonstrated that his sexual behavior with students extended over a twenty-year period.[173] The court agreed that the State Board of Education acted reasonably in determining that the teacher's long-term behavior rendered him presently unfit to perform his job.

In the latest chapter involving a consent decree that enjoined the Alabama State Board of Education from using its standard competency test to determine qualifications for teacher certification, a federal district court refused to modify its order.[174] The court rejected a motion to modify its order where the board did not produce evidence that the consent decree, as applied to the court-certified class of African-American teachers who had failed the certification test, was unworkable since it was unable to construct an acceptable alternative examination.

Conclusion

The issues that the courts have addressed in employment law have not changed appreciably over the past decade. Employees continue to dominate, probably reflecting increased emphasis on evaluations performed by school district officials. The relative dearth of constitutional as opposed to statutory concerns is mirrored in the trend toward suits being filed in state rather than federal courts. Moreover, the greater volume of litigation in state courts reflects the increased level of legislative and administrative activity regulating education.

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[171] Gee v. Prof'l Practices Comm'n, 491 S.E.2d 375 [121 Educ. L. Rep. 849] (Ga. 1997).

[172] Brogan v. Carter, 694 So. 2d 168 [118 Educ. L. Rep. 1247] (Fla. Dist. Ct. App. 1997).

[173] Joyell v. Comm'r of Educ., 696 A.2d 1039 [119 Educ. L. Rep. 1078] (Conn. Ct. App. 1997).

[174] Allen v. Alabama State Bd. of Educ., 976 F. Supp. 1410 [121 Educ. L. Rep. 984] (N.D. Ala. 1997).

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SCHOOL GOVERNANCE

Donald F. Uerling

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Introduction

This chapter reviews judicial decisions that resolved issues of school governance at state and local levels. The discussion includes reported cases from federal and state courts.

State Education Agencies and Officials

Insofar as education is a state function, educational agencies and officials play major roles in school governance.

State Boards of Education

When the legislature failed to restructure single-member districts for an election to the state board of education, five blacks in Alabama filed suit. After a trial court approved a consent judgment, the plaintiffs sought further review. The Supreme Court of Alabama remanded for a determination of whether the issue of race predominated over all other elements in drawing up a district with questionable boundaries and, if it did, whether the plan withstands strict scrutiny.[1]

A contractor sued a school district after the parties were unable to rely on the contract claim mechanism in the procurement rules established by the state board of education. The contractor contended that the rules were unconstitutional since the district board, one of the parties to the contract, also acted as the final agency decision maker regarding claims. An appellate tribunal struck the rules down as unconstitutional, but the Supreme Court of Arizona vacated and remanded without addressing the constitutional question.[2] The court held that the rules, which provided that the purchasing body constitute both the first and second tier of review of claims, did not comport with the state procurement code. The code required a two-tiered administrative process with the unit of government purchasing the goods or services at the first and the director of the state department of administration at the second. The court found a second inconsistency since the rules did not provide for the judicial review called for in the state procurement code.

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[1] Collins v. Bennett, 684 So. 2d 681 [115 Educ. L. Rep. 190] (Ala. 1995).

[2] R. L. Augustine Constr. Co. v. Peoria Unified Sch. Dist. No. 11, 936 P.2d 554 [118 Educ. L. Rep. 493] (Ariz. 1997).

State Commissioners of Education

A supervisor whose job was eliminated accepted a teaching position. After she was passed over for a subsequent supervisory position, she filed a petition with the commissioner of education, alleging that the school board violated her tenure rights as a supervisor; she also filed a sex discrimination claim with the EEOC. While the local board appealed the state board's determination in favor of the supervisor, she filed suit in the federal trial court in New Jersey alleging sex discrimination and retaliation under title VII as well as violations of the state anti-discrimination law. The court decreed that under the doctrine of the entire controversy, the commissioner was not competent to decide the title VII, state law, or breach of contract claims since they did not arise pursuant to state law.[3] The court added that even though the breach of contract claim was barred by collateral estoppel, the title VII and state discrimination charges could proceed because the commissioner did not have jurisdiction over such charges.

Parents in New York unsuccessfully sued the commissioner of education based on their claim that the commissioner routinely and improperly extended the three-year period of bilingual education for vast numbers of students in New York City's public schools. An appellate court affirmed a motion to dismiss for failure to state a cause of action.[4] The court found the board of education submitted the names of students who scored below the fortieth percentile on language assessment battery tests to the commissioner who followed state law by routinely approving the extensions.

State Departments of Education

A nonmerit employee in the Missouri Department of Elementary and Secondary Education who lost his job because he displayed improper behavior toward a subordinate sought further review of the commissioner's dismissal of his grievance. A trial court ordered the employee's reinstatement but was, in turn, reversed by an appellate panel.[5] The court was of the view that the commissioner acted properly since he relied on substantial and competent evidence that the male employee asked a female subordinate to hug him, touched her inappropriately on a number of occasions, and treated her in a cold and unfriendly manner when she rejected his advances.

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[3] Galbraith v. Lenape Reg'l High Sch. Dist., 964 F. Supp. 889 [118 Educ. L. Rep. 1015] (D. N.J. 1997).

[4] Bushwick Parents Org. v. Mills, 649 N.Y.S.2d 516 [114 Educ. L. Rep. 275] (N.Y. App. Div. 1996).

State Funding

State Finance Plans

In the first of two cases upholding state financing plans, plaintiffs challenged Alaska's school funding laws on the basis that differences in treatment violated their rights to equal protection under the state constitution. The Supreme Court of Alaska affirmed that the alleged discrimination did not rise to the level of equal protection.[6] The court asserted the plaintiffs failed to show that disparities in the local contribution required of districts translated into inequities in educational opportunities available to students and that the various laws providing state assistance for school construction interacted in such a way that some pupils and taxpayers, depending on where they lived, were at a disadvantage.

Plaintiffs sued state officials seeking a declaratory judgment that the statutory scheme governing the funding of public schools violated the state constitution. The basic contention was that the financing plan permitted vast differences in educational resources and opportunities among different school districts due to differences in local taxable property wealth. The Supreme Court of Illinois affirmed the dismissal of the suit.[7] The court observed that disparities in funding resulting from differences in local property wealth did not offend the constitution's efficiency requirement and that questions relating to the quality of education are solely for the legislature to answer.

The first of three cases that struck state plans down as unconstitutional was filed by students from poor urban special needs districts who contended that the finance formula failed to comply with the constitutional requirement of providing a thorough and efficient education. In the latest iteration of this long-running suit, the Supreme Court of New Jersey agreed that the Comprehensive Educational Improvement and Financing Act of 1996 was unconstitutional as applied to special needs districts.[8] The court acknowledged that although the educational content standards in the act were an essential component of a thorough and efficient education, the provisions failed to assure expenditures sufficient to enable students in special needs districts to meet them, and that the supplemental aid provided to those systems did not bear a demonstrable relationship to the real needs of the students in those areas. The court noted that there were many disparities between the resources available to meet the needs of children in poor urban areas and those who lived in districts of highest socioeconomic status.

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[5] Snyder v. Department of Elementary and Secondary Educ., 952 S.W.2d 764 [121 Educ. L. Rep. 862] (Mo. Ct. App. 1997).

[6] Matanuska-Susitna Borough Sch. Dist., 931 P.2d 391 [116 Educ. L. Rep. 401] (Alaska 1997).

[7] Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 [114 Educ. L. Rep. 576] (Ill. 1996).

Taxpayers and poor school districts sought a determination that the system of funding public education violated the state constitution. The Supreme Court of Ohio agreed that the system violated the mandate in the constitution calling for a thorough and efficient system of common schools.[9] In ascertaining that uncontested evidence showed great disparities in the opportunities available for students in property-rich and for students in property-poor districts, the court declared that the school foundation finance program neither remedied these disparities nor had any real connection with the financing necessary to provide an adequate education. The court concluded by admonishing the general assembly to create an entirely new financing system.

The third case was filed by plaintiffs who sought further review of the dismissal of their suit charging that the school finance plan was unconstitutional. The Supreme Court of Vermont reinstated the plaintiffs' motion for declaratory judgment.[10] The court agreed that the current system, with its substantial reliance on local property taxes and wide disparities in revenues available to local districts, violated the constitution because it deprived children of equal educational opportunities.

A final case resulted in a remand for further determinations as to the constitutionality of a school finance plan. Plaintiffs in poor rural districts, joined by intervenors in larger and wealthier systems, sought declaratory and injunctive relief on the basis that the system of funding violated the state constitution. The Supreme Court of North Carolina posited that although the constitution obligated the state to provide children with a sound basic education in the public schools, it did not require equal educational opportunities for all students.[11] However, the court added that the plaintiffs had made sufficient allegations to entitle them to attempt to prove on remand that the state's supplemental funding system violated equal protection as arbitrary and capricious. In the alternative, the court suggested that the plaintiffs could claim that the system denied children a sound basic education, thus establishing the denial of a fundamental right.

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[8] Abbot by Abbot v. Burke, 693 A.2d 417 [118 Educ. L. Rep. 371] (N.J. 1997).

[9] DeRolph v. State, 677 N.E.2d 733 [116 Educ. L. Rep. 1140] (Ohio 1997).

[10] Brigham v. State, 692 A.2d 384 [117 Educ. L. Rep. 667] (Vt. 1997).

Desegregation Plans

The first of two suits from Missouri involving ongoing desegregation cases took place in St. Louis. The Eighth Circuit affirmed that a federal trial court did not abuse its discretion in denying the state's motion to phase out its voluntary interdistrict transfer plan of black city students to county districts for the 1997-98 school year and to relieve it from any funding obligations for the program pending settlement negotiations.[12]

In Kansas City, the federal district denied the state's motion for unitary status over the achievement gap between black and white students, faculty and staff assignments, renovation of facilities, and transportation, but granted it with regard to extracurricular activities.[13] The court also approved the transition funding agreement and the dismissal of the state upon its payment of the sum agreed upon by the parties.

Allocation of State Funds

A governor petitioned for a writ of mandamus to require the expunction of proviso language in an appropriations act. The Supreme Court of Florida was of the opinion that the proviso, which allowed school boards to spend up to twenty percent of the funds appropriated to a categorical program for purposes other than those required by it, clearly violated the state constitution by attempting to use an appropriations bill to amend an existing statute on a subject other than appropriations.[14] The court directed the secretary of state to expunge the unconstitutional language and the comptroller to ensure that the change was reflected in the state's financial operations. However, since it believed that the parties would comply with the directives, the court withheld issuance of a writ of mandamus.

School districts challenged an amendment to the state constitution that imposed a complex system of revenue and tax limits including the Maintenance-of-Support Clause, which prevents the state from shifting financial burdens to local governments. In the consolidation of three actions involving the Clause, the Supreme Court of Michigan judged that cost of special education and related transportation were state-mandated activities and that the "state match" payment for school lunches was part of the "state finance proportion" for computing compliance with the Clause.[15] The court added that since state payments required under the Clause were constitutionally dedicated for specific purposes, they could not be reduced by executive order and that the appropriate remedy was a judgment for the school districts for the full amount of underfunding for the three prior years.

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[11] Leandro v. State, 488 S.E.2d 249 [120 Educ. L. Rep. 304] (N.C. 1997).

[12] Liddell v. Board of Educ. of St. Louis, 126 F.3d 1049 [121 Educ. L. Rep. 530] (8th Cir. 1997).

[13] Jenkins v. State, 959 F. Supp. 1151 [118 Educ. L. Rep. 117] (W.D. Mo. 1997).

[14] Chiles v. Milligan, 682 So. 2d 74 [114 Educ. L. Rep. 714] (Fla. 1996).

A state appealed the reversal of a ruling dismissing a suit by a county board of education concerning overpayments it received in the program under which the state made monetary contributions to school districts for their costs associated with Social Security and retirement benefits. The Court of Appeals of Maryland reinstated the state's motion to dismiss.[16] The court indicated that the suit should have been dismissed because the legislature did not provide the right of judicial review under the circumstances.

School boards and their staffs sued a state employees group benefits program based on its refusal to raise premiums for its self-funded health care program. The plaintiffs argued that by relying on the legislature for assistance, the state attempted to force boards to participate in the program rather than procure private insurance. An appellate court in Louisiana affirmed the dismissal of the claim.[17] The court offered that since board employees who chose not to participate in the program were not similarly situated with those who did, they were ineligible to bring an equal protection claim.

Where a public school employees' retirement system provided health insurance premium assistance payments to retirees who were enrolled in board-approved programs, a claimant contented that although he was not covered by such a program, he was eligible since he was in one with a board-approved carrier. An appellate court in Pennsylvania affirmed the board's denial of his request for assistance.[18] The court pointed out that state law requires a claimant to be enrolled in a board-approved health insurance program in order to be eligible for the premium assistance payments.

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[15] Durant v. State, 566 N.W.2d 272 [119 Educ. L. Rep. 1146] (Mich. 1997).

[16] State v. Board of Educ., 697 A.2d 1334 [120 Educ. L. Rep. 514] (Md. 1997).

[17] East Baton Rouge Parish Sch. Bd. v. State, 700 So. 2d 945 [121 Educ. L. Rep. 1224] (La. Ct. App. 1997).

[18] Hanna v. Commonwealth Pub. Sch. Employees Retirement Sys./Bd., 701 A.2d 800 [121 Educ. L. Rep. 1094] (Pa. Commw. Ct. 1997).

Special Schools and School Districts

Charter Schools

Plaintiffs unsuccessfully challenged the state's Charter Schools Act on the basis that it used public funds for what were essentially private academies. The Supreme Court of Michigan upheld the constitutionality of the act.[19] The court upheld the Act since the state was not obligated to retain exclusive control over a school system. The court noted that the academies were under the ultimate and immediate direction of the state and its agents even though the private boards of directors were neither publicly elected or appointed. The court added that there was no constitutional requirement for local control since a number of schools were controlled by the state board of education and that the parochiaid amendment, which prohibited the expenditure of public funds for religious institutions, did not limit the definition of public schools to exclude the academies.

Special School Districts

Shortly after the Supreme Court struck down a law creating a special school district for members of a religious group, the legislature and governor passed and signed a new bill into effect that accomplished the same purpose as the old one. Consequently, taxpayers sought a declaration that the new legislation was also unconstitutional.[20] The Court of Appeals of New York affirmed that the new act was unconstitutional. Despite its purported facial neutrality, the court interpreted the legislation as having the non-neutral effect of allowing that one community, but no other group at that time and probably ever, to create its own district. The court also ruled that the legislation violated the Establishment Clause by effectively singling the group out for special treatment, thereby demonstrating impermissible governmental endorsement of the religious community.

Special Schools

Several years after a district in Minnesota closed an elementary school in one of the two towns within its boundaries, a member of a religious group entered into an agreement with the district to reopen the school. The purchaser agreed to pay for the facility while the district provided a teacher and supplies. Although the school generally followed the district's curriculum, the agreement complied with the wishes of the religious group by limiting the use of electronic technology. While the school was open to any student living in the district, only children of the religious group enrolled there. A federal trial court enjoined the district from operating the school, but the Eighth Circuit vacated the injunction and ordered the case dismissed.[21] The court found that the district did not violate either the federal or state constitution since it merely accommodated parental wishes that were granted routinely regardless of their religious affiliations. The court added that since the district acted neutrally, it neither endorsed religion nor a set of religious beliefs. Finally, the court observed that religious instruction did not take place in the school and public funds were not used to support religious beliefs.

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[19] Council of Org. v. Governor, 566 N.W.2d 208 [120 Educ. L. Rep. 265] (Mich. 1997).

[20] Grumet v. Cuomo, 659 N.Y.S.2d 173 [119 Educ. L. Rep. 603] (N.Y. 1997).

Special Governance Arrangements

In the District of Columbia, the Control Board created the Emergency Transitional Education Board of Trustees (ETEBT) and transferred most its powers to this new body. The board of education challenged the control board, claiming that the creation of the ETEBT violated the school board members' statutory and constitutional rights. The federal district court granted the Control Board's motion to dismiss.[22] The court decreed that since Congress delegated its plenary power over the District of Columbia's schools to the Control Board, it had the statutory authority to act as it did. The court added that the Control Board did not violate the voting rights of members of the board of education either in their official or individual capacities.

School District Boundary Changes

A family that petitioned for a minor boundary change that would have transferred their property to another school district appealed after a determination in their favor was overturned. The Supreme Court of South Dakota affirmed on the basis that substantial evidence supported the board's initial denial of the family's petition.[23]

Where a regional school district was responsible for high school education, five of the six municipalities under its control sought its dissolution. The sixth system unsuccessfully challenged the state board of review's decision to permit the dissolution election to proceed. An appellate court in New Jersey affirmed that the board's action was closely circumscribed by law, which set out possible grounds for a denial, all of which would have been inconsistent with the thorough and efficient system of free public schools that the state was required to provide.[24] The court rejected the district's argument that it was entitled to an evidentiary hearing because it failed to show that there were any genuine factual disputes material to the issue that the board was required to act upon.

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[21] Stark v. Independent Sch. Dist., 123 F.3d 1068 [121 Educ. L. Rep. 41] (8th Cir. 1996).

[22] Shook v. Dist. of Columbia Fin. Responsibility and Management Assistance Auth., 964 F. Supp. 416 [118 Educ. L. Rep. 966] (D.D.C. 1997).

[23] Oelrichs Sch. Dist. 23-3 v. Sides, 562 N.W.2d 907 [118 Educ. L. Rep. 483] (S.D. 1997).

A city school district sought further review after the state board of education granted a petition permitting children to transfer to the system in which they lived. An appellate court in Ohio affirmed.[25] The court acknowledged that since the board followed state law in giving primary consideration to the interests of the few children who were involved, the impact on racial balance that the transferring district feared did not violate equal protection.

Where a regional board of school trustees denied a second petition for a district boundary change that was submitted fourteen weeks after their earlier, similar, request was rejected, the petitioners sought further review. An appellate court in Illinois affirmed.[26] The court agreed that the board properly dismissed the second petition because it was not substantially different from the first.

School District Board Membership

Removal of Board Members

Where a committee sought to recall a school board member, the petition was improperly filed with the clerk of the borough who decided that a special election could not be scheduled because its cost was not affixed to the petition. On judicial review, a court in New Jersey held that filing the recall petition with the borough clerk did not void the process. Even so, the court dismissed the petition.[27] The court contended that the petition was filed too late for the recall election to take place in the spring because of the upcoming regular school board election and could not take place as part of the fall general election since that date was within six months of the end of the board member's term. The court added that the petition could not be converted to a request for a special election because the cost was not attached to it and the recall committee could not be allowed to finance the election as private citizens.

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[24] *In re* Petition for Authorization to Conduct a Referendum on Dissolution, 688 A.2d 1082 [116 Educ. L. Rep. 320] (N.J. Super. Ct. App. Div. 1997).

[25] Cincinnati City Sch. Dist. v. State Bd. of Educ., 680 N.E.2d 1061 [119 Educ. L. Rep. 239] (Ohio Ct. App. 1996).

[26] Helmig v. Regional Bd. of Sch. Trustees, 675 N.E.2d 966 [115 Educ. L. Rep. 1005] (Ill. App. Ct. 1997).

[27] Committee to Recall Theresa Casagrande v. Casagrande, 701 A.2d 478 [121 Educ. L. Rep. 1081] (N.J. Super. Ct. Law Div. 1997).

Miscellaneous Election Issues

Systems for the election of members to boards of education led to three challenges on either statutory or constitutional grounds. A county and school board sought further review of a declaration that an amendment to their home rule charter calling for nonpartisan elections of school board members was unconstitutional. An appellate court in Florida reversed on the ground that chartered counties can elect board members on a nonpartisan basis.[28]

Based on significant population changes within a school district, citizens in Pennsylvania unsuccessfully filed a petition to change the process for selecting board members from single-member regions to at-large elections. At the same time, the court granted the board's petition to realign the existing regions so that the population would be more equally distributed. An appellate court vacated and remanded for a reconsideration of whether the board's plan would apportion the population so that all regions would be equal.[29] The panel rejected the citizens' contentions that the trial court considered other factors than those mandated in state law and that it abused its discretion by ordering the reapportionment to be phased in rather than being implemented immediately.

In Tennessee, an appellate court confirmed the legislature's authority to replace elected county superintendents with directors who are appointed by local boards of education.[30] The court judged that the legislature always has the right to abolish offices that it created.

None of the five challenges to school board election systems were successful under section 2 of the federal Voting Rights Act (VRA). The electoral process used to select board members in a district in Delaware permitted nominations by each of seven nominating districts, but voting at-large across the entire system. Disgruntled black citizens filed a class action suit claiming that the system violated the VRA because at-large voting diluted their electoral power. The federal trial court in Delaware analyzed the record of minority voting success and concluded that under the circumstances, section 2 had not been violated. On further review, the Third Circuit affirmed that the trial court's judgment was not clearly erroneous.[11]

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[28] County of Volusia v. Quinn, 700 So. 2d 474 [121 Educ. L. Rep. 1215] (Fla. Dist. Ct. App. 1997).

[29] *In re* Petition to Reapportion Sch. Dir. Regions, 688 A.2d 1275 [116 Educ. L. Rep. 332] (Pa. Commw. Ct. 1997).

[30] County of Shelby v. McWherter, 936 S.W.2d 923 [115 Educ. L. Rep. 553] (Tenn. Ct. App. 1996).

On remand, a federal trial court entered a decree establishing voting districts for elections to a school board in Arkansas. The court accepted the plaintiffs' plan calling for an eight-member board elected from single-member districts while rejecting the board's approach that suggested seven-members, five of which were to be chosen from across the system and two at- large. Under the plaintiffs' approach, three of the eight districts were majority-minority. The board's plan called for two majority-minority districts. The Eighth Circuit affirmed that the trial court did not err in adopting a plan that would steer clear of racial gerrymandering yet vindicate the right of minority voters.[12] The court added that the plan was acceptable because race had not been shown as the predominate factor in creating minority-majority districts to the exclusion of traditional principles of creating districts such as compactness, contiguity, and respect for political subdivisions or communities with shared interests.

Following a remand from the Eleventh Circuit, a federal district court in Florida examined whether a plan calling for at-large countywide elections diluted the votes of blacks. The court viewed the results, rather than the intent, of the action and noted that the evidence relevant to the totality of the circumstances failed to demonstrate the existence of a violation since blacks had equal access to the political process in elections for the county commission and county school board.[13]

A voting rights case in North Carolina involved a proposed merger of a county and city school districts, with board members for the new system chosen by means of a 4-2-1 electoral plan. White voters challenged the plan which called for four single-member districts, two overlaying single-member districts, and one at-large member, including three minority-majority voting districts. A federal district court asserted that the plaintiffs failed to satisfy the evidentiary standard to maintain a claim under section 2 because they relied on conclusory allegations that the apportionment plan was improper.[14] The court added that the plaintiffs lacked standing to maintain an equal protection suit because they did not reside in the majority-minority districts.

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[11] Jenkins v. Manning, 116 F.3d 685 [119 Educ. L. Rep. 78] (3d Cir. 1997).

[12] Harvell v. Blytheville Sch. Dist. No. 5, 126 F.3d 1038 [121 Educ. L. Rep. 525] (8th Cir. 1997).

[13] Solomon v. Liberty County, 957 F. Supp 1522 [117 Educ. L. Rep. 555] (N.D. Fla. 1997).

[14] Canon v. Durham County Bd. of Elections, 959 F. Supp. 289 [117 Educ. L. Rep. 1045] (E.D.N.C. 1997).

Hispanic residents unsuccessfully challenged the at-large voting system created by their school board for electing members. The residents argued that the plan violated the VRA and the Fifteenth Amendment by diluting the votes of politically cohesive Hispanics. A federal trial court in Texas dismissed the claim on the ground that the plaintiffs failed to show that it was possible to create a single-member district in which the majority of voting-age citizens were Hispanic, a necessary precondition for a VRA violation, and that they were unable to prove their constitutional claim because they could not show that the board intended to discriminate against minorities.[35]

The first of two cases successfully raising constitutional challenges to plans for electing board members arose in Tennessee where a county had separate school districts for itself and a city. The board of county commissioners enacted a plan under which members of the county board would have been chosen from seven single-member districts that covered the entire county. Consequently, county residents claimed that this diluted their votes because city dwellers could also select these board members. A federal trial court enjoined the implementation of the plan on the basis that it was unconstitutional. On further review, the Sixth Circuit affirmed.[36] The court agreed that the election provisions violated the principle of "one person, one vote."

Pursuant to a state law authorizing a change when at least twenty-five percent of a school district's enrollment is made up of minority students, a board in Arizona adopted a ward system in place of at-large voting. Subsequently, electors challenged the validity of an election that was conducted under the ward system. An appellate court affirmed that the electors had standing to sue since their rights were violated and that the law was unconstitutional because the section at issue did not satisfy strict scrutiny because it was explicitly race-based.[37] However, the panel reversed the order invalidating the election and continued the terms of former board members, invoking the doctrine of laches to limit the remedy to calling for a future election.

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[35] Perez v. Pasadena Indep. Sch. Dist., 958 F. Supp. 1196 [117 Educ. L. Rep. 907] (S.D. Tex. 1997).

[36] Board of County Comm'rs v. Burson, 121 F.3d 244 [120 Educ. L. Rep. 420] (6th Cir. 1997).

[37] McComb v. Superior Ct., 943 P.2d 878 [120 Educ. L. Rep. 1175] (Ariz. Ct. App. 1997).

School District Board Meetings

Open Meetings

A school board member in Michigan sued the board and its other members alleging that they violated the state open meetings act by reaching consensus about a collective bargaining proposal from teachers during a closed session. An appellate court affirmed a grant of summary judgment in favor of the defendants.[38] The court pointed out that while the law prohibited the board from making a decision in a closed session, it could deliberate and formulate a strategic plan of action during one.

Former and current members of a board of education in Missouri sued present members, claiming violations of the state sunshine law. An appellate court affirmed a directed verdict for the defendants on the ground that a social gathering at the home of a board member was not a public meeting because the statute specifically excluded such informal gatherings when there is no intent to avoid the purposes of the sunshine law.[39] The court added that discussions between individual board members over the dismissal of the superintendent was not subject to the sunshine law since a gathering of less than a quorum is not a meeting of a public body when there is no intent to avoid complying with the law.

An appellate court in Florida affirmed that the sunshine law was violated when a board of education and its attorney went into closed session to establish a negotiating posture with other parties to a desegregation suit over the modification of school zone boundaries.[40] The court was of the opinion that discussing methods of achieving continuing compliance with the federal mandate did not come within the closed meetings exception for settlement negotiations. However, the court limited the injunction to these specific discussions, recognizing that there could be other topics related to the litigation that could be appropriately discussed in private.

Where the former president of a school board in Texas was convicted of calling and participating in a special closed meeting that was not permitted under the state open meetings act, he unsuccessfully argued that the law required a finding that he knew that such a session was impermissible. An appellate court affirmed that given the general rule that all meetings are open, the plain language of the statute and the absence of a good faith exception, a government official can be found guilty of violating the act by calling or participating in an impermissible closed meeting, even if he is unaware of its illegality.[31]

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[38] Moore v. Pennville Pub. Sch. Bd. of Educ., 566 N.W.2d 31 [119 Educ. L. Rep. 1133] (Mich. Ct. App. 1997).
[39] Colombo v. Buford, 935 S.W.2d 690 [115 Educ. L. Rep. 160] (Mo. Ct. App. 1996).
[40] Freeman v. Times Pub. Co., 696 So. 2d 427 [119 Educ. L. Rep. 752] (Fla. Dist. Ct. App. 1997).

Miscellaneous Issues

Where a board of education instituted the practice of beginning meetings with a prayer or moment of silence, a federal magistrate agreed with a teacher and student that this violated the Establishment Clause. On further review, a federal district court in Ohio reversed in favor of the board.[32] Believing this to be a case of first impression that was more akin to when prayer is constitutionally permissible to solemnize sessions of public bodies, the judge granted the board's motion for summary judgment.

Residents in a school district challenged a board bylaw that prohibited criticism of an employee in an open meeting without the person's consent and required the submission of proposed agenda items to the superintendent nine days prior to a regular meeting. On cross-motions for summary judgment, a federal trial court in California decreed that the restriction on criticism was constitutionally impermissible, but that the requirement regarding submission of agenda items was not.[33] The court determined that since a board meeting was a limited public forum, not allowing criticism of the superintendent was an impermissible viewpoint-based restriction. However, the court agreed that submitting proposed agenda items to the superintendent, with a right of appeal to the board, was necessary as it permitted the board to control its agenda.

Powers of School District Boards

Landowners successfully challenged a contract that a school district entered with a private corporation for access road easements to a new school site. The taxpayers claimed that the contract was void as ultra vires because part of the road was going to be on the corporation's property. On further review, the Supreme Court of Nebraska reversed in favor of the board and corporation.[34] The court reasoned that since the road was a necessary appendage to the new school site, the board had the implied authority to enter into the contract for its construction.

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[31] Tovar v. State, 949 S.W.2d 370 [120 Educ. L. Rep. 349] (Tex. Ct. App. 1997).

[32] Coles v. Cleveland Bd. of Educ., 950 F. Supp. 1337 [115 Educ. L. Rep. 926] (N.D. Ohio 1996).

[33] Leventhal v. Vista Unified Sch. Dist., 973 F. Supp. 951 [121 Educ. L. Rep. 95] (S.D. Cal. 1997).

[34] Robertson v. School Dist. No. 17, 560 N.W.2d 469 [116 Educ. L. Rep. 1221] (Neb. 1997).

Voters appealed the denial of their request for an injunction that would have required a district to conduct a second reconsideration vote on the annual school budget. The Supreme Court of Vermont affirmed,[45] citing that state law allowed only one reconsideration vote on a budget in a given year even though the reconsideration votes submitted different amounts to voters.

A school district requested further review of the dismissal of its complaint that provisions in a negotiated contract, which placed no limit on the number of paid days that an employee could receive if necessitated by an on-the-job injury, were barred by state law. The district tried to rely on a law that limited the total number of days of paid leave to no more than twelve per year. An appellate court in Washington affirmed in favor of the union.[46] The court offered that the key question was whether the supplemental compensation constituted annual leave that was subject to the statutory cap. The court distinguished the supplemental compensation and ruled that, unlike annual leave, it did not accrue from year to year, could not be taken at any time, did not affect retirement eligibility, and is not transferable to another district. Accordingly, the court acknowledged that since the supplemental compensation did not conflict with the statute, the district had the statutory authority to grant this additional benefit.

In Illinois, a bus company sought further review of the denial of its request for injunctive relief over the way a board of education awarded contracts. At issue was the board's authority to impose a two percent local business preference. An appellate court affirmed even though it maintained that the preference was an unconstitutional delegation of authority because the board did not have the statutory ability to adopt such a policy.[47] The court decided that since the bus company was not a local business, it was estopped from challenging the preference because it waited until it did not receive the benefits of the ordinance before filing suit.

After teachers and their unions claimed that two school boards violated state statutes that required them to contract with insurance companies for health benefit plans, one of the boards sought further review. An appellate court in New Jersey affirmed.[48] The court held that the benefits package violated state law because it was basically a self-insurance plan.

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[45] Santi v. Roxbury Town Sch. Dist., 685 A.2d 301 [114 Educ. L. Rep. 565] (Vt. 1996).

[46] Seattle Sch. Dist. No. 1 v. International Union of Operating Eng'rs, 944 P.2d 1062 [121 Educ. L. Rep. 367] (Wash. Ct. App. 1997).

[47] Best Bus Joint Venture v. Board of Educ. of Chicago, 681 N.E.2d 570 [120 Educ. L. Rep. 217] (Ill. App. Ct. 1997).

[48] Atlantic City Educ. Ass'n v. Board of Educ. of Atlantic City, 691 A.2d 884 [117 Educ. L. Rep. 627] (N.J. Super. Ct. App. Div. 1997).

Where a state law calls for an annexation petition to contain the signatures of owners of at least sixty percent of the total assessed value of all property in the area to be added, a school district was a necessary signatory to satisfy this requirement. Yet, another section of the law limits a district's authority to petition for annexation when its property constitutes the whole parcel to be added. After the state boundary review board approved the annexation, a trial court reversed in favor of the owner. On further review, an appellate court in Washington affirmed.[49] The court agreed the district lacked the authority to petition for annexation insofar as its property was not the whole parcel to be added. As such, the court concluded the district's signature could not be counted in calculating the sufficiency of the petition.

In the first of two cases defining the powers of local boards in relation to government agencies, school districts brought a class action suit against the state retirement system to recover overpayments and a declaration that the amendment to the statute on which the contributions were based was unconstitutional. The districts appealed a dismissal in favor of the retirement system. The Supreme Court of Missouri affirmed.[50] The court declared that the legislature may waive or impair vested rights of districts without violating the prohibition in the state constitution against enacting retrospective laws. The court added the amendment did not violate the separation of powers doctrine because it did not abrogate any final adjudication of the pending litigation involving the retirement system.

Pursuant to state law, when a superintendent notified a tenured teacher that his contract would be terminated for inefficiency and incompetency, the instructor requested a hearing before a three-member tribunal appointed by the chief state school officer. After hearing evidence from the teacher and local board, the tribunal stated that the contract should not have been terminated. Insofar as the statute permitted teachers, but not school systems, to challenge a tribunal's actions, the board filed a declaratory judgment action requesting the right to appeal. The Supreme Court of Kentucky agreed that the board had the right to appeal because the tribunal was an independent entity, not its agent.[51] The court was of the view that the board, as a political body, with a corporate structure that brought it within a constitutional protection against complete and arbitrary state power, had the inherent right to seek judicial review.

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[49] King County Water Dist. v. City of Renton, 944 P.2d 1067 [121 Educ. L. Rep. 372] (Wash. Ct. App. 1997).

[50] Savannah R-III Sch. Dist. v. Public Sch. Retirement Sys., 950 S.W.2d 854 [120 Educ. L. Rep. 1239] (Mo. 1997).

[51] Reis v. Campbell County Bd. of Educ., 938 S.W.2d 880 [116 Educ. L. Rep. 830] (Ky. 1996).

School District Financial Affairs

Taxing Authority

A taxpayer sought a declaratory judgment to prevent a local school system from levying taxes in excess of twenty mills. A trial court posited that the system was exempt from this limitation under a grandfather clause in the state constitution. The Supreme Court of Georgia affirmed that the limit did not apply to systems authorized to levy a school tax in excess of twenty mills on the effective date of the 1983 constitution.[52] The court added that the system had the authority to levy a school tax at the millage rate determined by its board.

Where a utility company objected to real estate taxes levied against it, a trial court in Illinois found in favor of the school district and county treasurer. On further review, an appellate court affirmed.[53] The court contended that state law permitted the district to adopt a levy to generate revenue for the ensuing fiscal year.

In a second case from Illinois, property owners challenged a grant of summary judgment in favor of the county collector and overruling their objections to taxes levied by school districts and other taxing bodies for contributions to the municipal retirement fund. An appellate court affirmed.[54] The court noted since the duly adopted district budget set aside spending for the retirement fund and satisfied state law, a separate ordinance for appropriations was unnecessary.

Pursuant to the local tax enabling act, a school district adopted a resolution assessing a ten percent transaction tax on the price paid by patrons of nonresidential parking sites. When governmental and private operators of parking facilities sued the district, a trial court invalidated the tax. On further review, an appellate court in Pennsylvania reversed in favor of the district.[55] The court asserted that because the transaction tax was authorized by the local enabling act, it did not violate constitutional uniformity or equal protection and was neither unreasonable nor excessive.

In the first of three successful challenges to the taxing authority of school districts, residents sued over the increased tax bills they received after their property was reappraised. A trial court dismissed the claim for lack of jurisdiction. On appeal, the Supreme Court of Arkansas reversed.[56] The panel reflected that the lower court had the authority to resolve the dispute because the tax increase, which exceeded constitutional limits, was an illegal exaction.

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[52] Lane v. City of Atlanta, 483 S.E.2d 575 [117 Educ. L. Rep. 790] (Ga. 1997).

[53] People *ex rel.* Weber v. Commonwealth Edison Co., 679 N.E.2d 103 [118 Educ. L. Rep. 714] (Ill. App. Ct. 1997).

[54] *In re* Du Page County Collector, 679 N.E.2d 474 [118 Educ. L. Rep. 717] (Ill. App. Ct. 1997).

[55] Capitol Assocs. v. School District of Harrisburg, 684 A.2d 1119 [114 Educ. L. Rep. 546] (Pa. Commw. Ct. 1996).

Home builders sued two counties over the legality of school impact fees that were used to pay for facilities needed to accommodate additional students. Trial courts in both cases granted motions for summary judgment in favor of the builders because the county commissioners lacked authority to require additional payments for school districts. In a consolidated appeal, the Supreme Court of Colorado agreed that the counties had neither explicit nor implied authority to charge and collect the fees since the legislature fixed the time and the amount of the school exaction fee that could be charged.[57]

Where a state statute required county assessors to re-value real property and called for apportioning the costs associated with it among the recipients of tax revenues, a county assessor successfully sued three school districts that had not paid their share of these expenses. On further review, the Supreme Court of Oklahoma pointed out that as long as the cost of revaluation is included in a district's budget, an assessor may obtain a judgment for such an expense.[58]

Bonds and Leases

The first of four cases dealing with issues related to bonds and leases for school construction involved an ongoing desegregation suit in Illinois. The Seventh Circuit affirmed that part of a magistrate's order directing the district to issue certificates of participation to finance a building program to upgrade predominantly minority schools and erect three new schools in minority neighborhoods.[59] The court added that this method of financing the building program was justified because it avoided having the federal judiciary displace the state's taxing authority.

In New York, a petitioner unsuccessfully challenged a referendum that approved a bond resolution based on his claim that informational newsletters mailed out by the board of education were improper. An appellate court affirmed that the commissioner of education did not act arbitrarily, capriciously, or irrationally in determining that the newsletters did not improperly advocate the passage of the bond.[60] In addition, the court ascertained that the petitioner failed to establish either that the board's published cost figures were inaccurate or that the claimed irregularities affected the outcome of the election. Rather, the court decided that the materials merely explained why the board favored bonded indebtedness over a straight tax increase and how the bond money would help rectify problems with deficient school structures.

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[56] Barker v. Frank, 939 S.W.2d 837 [116 Educ. L. Rep. 1271] (Ark. 1997).

[57] County Comm'rs v. Bainbridge, 929 P.2d 691 [115 Educ. L. Rep. 123] (Colo. 1996).

[58] Clay v. Independent Sch. Dist. No. 1, 935 P.2d 294 [117 Educ. L. Rep. 756] (Okla. 1997).

[59] People Who Care v. Rockford Bd. of Educ., 111 F.3d 528 [117 Educ. L. Rep. 473] (7th Cir. 1997).

[60] Crawmer v. Mills, 657 N.Y.S.2d 533 [118 Educ. L. Rep. 724] (N.Y. App. Div. 1997).

Remonstrators sought further review of a final determination where the Indiana board of tax commissioners refused to issue subpoenas to prepare for a hearing over the approval of a lease-purchase agreement in connection with a school construction project. The tax court agreed that since the remonstrators were not parties to the proceedings before the state board, they were not entitled to invoke trial discovery rules before an administrative agency.[61]

A subcontractor who had not been paid for installing septic tanks sued the surety on a payment bond furnished by the general contractor on a middle school construction project. The subcontractor complied with the pre-suit notice that was in the bond but not in state law since it was recorded with the county but filed with the school board. Following a grant of summary judgment in favor of the subcontractor, the surety sought further review. An appellate panel in Florida indicated that the statute governing recordation of payment bonds on public construction projects can only be satisfied by recording them with the clerk of the county court, not in the public records of a school district.[62]

Use of Funds

A taxpayer unsuccessfully sued a school district claiming that the school district violated state law by paying for the construction of a new addition using money from a special levy approved at an annual meeting and from the general fund budget allocation for building. The taxpayer contended that only the electors of the school district, through the passage of a bond issue, could authorize such a building project. The Supreme Court of Nebraska affirmed in favor of the district.[63] The court was of the opinion that the board did not exceed its authority by paying for the construction by means of a combination of funds generated by a special levy and those approved by the board for general purposes.

A school board member filed a declaratory judgment action against the board, its president, and the district superintendent, contending that the board allegedly made unlawful expenditures three years earlier for a baseball field construction project. The board had authorized this expenditure before the plaintiff became a board member. The board had rejected all bids and financed the construction as a maintenance project since this was a more economical approach than relying on outside contractors. An appellate court in Pennsylvania affirmed a grant of summary judgment in favor of the board.[64] The court ruled that the board member's exclusive method of challenging district expenditures was to contest the yearly audit report.

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[61] Boshart v. State Bd. of Tax Comm'rs., 672 N.E.2d 499 [114 Educ. L. Rep. 290] (Ind. Tax Ct. 1996).

[62] WPC v. Hartford Accident & Indem. Co., 698 So. 2d 1324 [121 Educ. L. Rep. 424] (Fla. Dist. Ct. App. 1997).

[63] Rauert v. School Dist. I-R, 555 N.W.2d 763 [114 Educ. L. Rep. 628] (Neb. 1996).

A vendor of electrical supplies argued that the resolution of protests arising from the contract bidding process was governed by a statute pertaining to the executive branch of state government. Affirming an order of the state division of administrative hearings, an appellate court in Florida decreed that since boards are constitutional entities that are not part of the executive branch of state government, relief was properly denied under the statutory section pertaining to purchases by the executive branch.[65]

School District Employment Affairs

Administrators

In the first of two cases involving superintendents and their retirement compensation, a public school employees' retirement board appealed a ruling in favor of a former administrator who contested the calculation of his benefits after he entered termination agreements with two districts. The Supreme Court of Pennsylvania reversed in favor of the board in noting that the salary increases the superintendent received as part of the termination agreements constituted severance payments and should have been excluded from compensation when his final average salary was computed.[66] The court added that the superintendent ceased being a school employee who was entitled to earn credited service on the last day he actually worked for regular pay rather than on the official resignation date in the termination agreement.

A superintendent in New York disputed the state retirement system's calculation of his pension benefits after the state excluded funds that the superintendent received for accumulated sick leave as part of a three-year terminal contract. Pursuant to state law, lump-sum payments for accumulated sick leave are excluded in the calculation of average salary to avoid artificial inflation by payments made in anticipation of retirement. The superintendent argued that since the terminal contract did not include a provision for exchanging salary for sick leave, this amount should not have been excluded. Yet, the percentage salary increases that the superintendent received during his terminal contract were much higher than for earlier agreements and he had waived his right to accumulated sick leave. A trial court dismissed in favor of the retirement system and an appellate panel affirmed.[67] The court was of the view that, based on the evidence, the retirement system could rationally conclude that the superintendent received substantially larger than usual pay increases in exchange for the right to be compensated for previously accumulated sick leave.

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[64] Bennett v. Mountain View Sch. Bd., 693 A.2d 651 [118 Educ. L. Rep. 412] (Pa. Commw. Ct. 1997).

[65] Dunbar Elec. Supply v. School Bd. of Dade County, 690 So. 2d 1339 [117 Educ. L. Rep. 798] (Fla. Dist. Ct. App. 1997).

[66] Hoerner v. Commonwealth Pub. Sch. Employees' Retirement Bd., 684 A.2d 112 [114 Educ. L. Rep. 197] (Pa. 1996).

In the first of four additional cases from New York, the state sought further review after it unsuccessfully sued a retired superintendent to recover what it deemed to be illegal or excessive compensation he received where he filled a combination of two jobs. An appellate court affirmed in favor of the superintendent.[68] The court maintained that while the employment agreements were improvident, they were neither illegal nor unauthorized.

Members of a community school board sought to set aside a directive of the chancellor that: annulled their selection of a community superintendent; directed the school board to reconvene to choose a different candidate; and, enjoined the school board's suspension for failing to complete the selection process to the chancellor's satisfaction. In noting that the legislature vested local school boards with the power to select a superintendent, a trial court declared the chancellor may not exercise a veto power over a candidate by claiming that a board violated its own selection procedures or that the person chosen was unqualified.[69] On further review, an appellate court affirmed that the chancellor misused his power by intruding on the board's statutory power to hire a superintendent by substituting his judgment for theirs on the merits of a particular candidate.[70]

A probationary principal unsuccessfully challenged his dismissal. An appellate court in New York affirmed that the chancellor properly exercised his statutory authority in superseding the board's refused to terminate the principal's contract where a review team reported serious deficiencies in his administrative performance and appointed trustees who effected the discontinuance of his service.[71]

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[67] Moraghan v. Teachers Retirement Sys., 654 N.Y.S.2d 852 [116 Educ. L. Rep. 1107] (N.Y. App. Div. 1997).

[68] People v. Murphy, 652 N.Y.S.2d 754 [115 Educ. L. Rep. 447] (N.Y. App. Div. 1997).

[69] Maldonado v. Crew, 652 N.Y.S.2d 487 [115 Educ. L. Rep. 433] (N.Y. Sup. Ct. 1996).

[70] Maldonado v. Crew, 653 N.Y.S.2d 596 [116 Educ. L. Rep. 347] (N.Y. App. Div. 1997).

In Pennsylvania, a complainant unsuccessfully alleged that a school board violated state law by reappointing a superintendent for an additional term at a special, rather than a regular, meeting. An appellate court agreed that state law allowed the board to reappoint the superintendent at either a regular or a special meeting.[72]

The estate of a former associate superintendent disputed a ruling in favor of a board that permitted his demotion to a middle school principalship with a corresponding decrease in salary. After an evidentiary hearing, the board rejected the hearing officer's recommendation that the administrator not be demoted because there was no evidence of incompetency. At issue was the administrator's behavior regarding the purchase and maintenance of school property and appearances of favoritism and impropriety. An appellate court in Florida affirmed in favor of the board.[73] The court agreed that the board properly rejected the hearing officer's interpretation of facts regarding the administrator's behavior and substituted its own judgment of whether his actions constituted misconduct or incompetence.

Prior to the merger of three school systems in North Carolina, one of the boards entered into a multi-year contract with its superintendent and extended the superintendent's contract past the date of the consolidation. Under the terms of the agreement, the superintendent received a lump sum payment of his remaining compensation since he was not rehired by the new board. When the new board and the board of county commissioners sued the superintendent to recover the funds, a trial court granted their motion for summary judgment and an appellate panel affirmed.[74] The court agreed that the prior board did not have the authority to bind the new one by extending the superintendent's contract past the date of consolidation.

Teachers

An African-American teacher who was fired filed a race discrimination suit in federal court while also pursuing administrative remedies with the state commissioner of education on the basis that the school district failed to follow proper procedures in his dismissal. When the commissioner ruled in the teacher's favor, the district refused to reinstate the teacher. Moreover, as the teacher's administrative appeal was pending, the court granted the district's motion for summary judgment on his discrimination claim. The teacher then sued the district in state court for breach of contract and to enforce the reinstatement order. A trial court granted the district's motion for summary judgment on the basis that the suit was barred by *res judicata* due to the teacher's earlier discrimination claim. An appellate tribunal reversed on the ground that since the district was protected by Eleventh Amendment immunity, the teacher could not have brought his state claims in federal court. The Supreme Court of Texas, in turn, reversed in finding that the district and its board members were amenable to suit in federal court, that the federal court had jurisdiction to consider the state law charges, and that *res judicata* precluded the subsequent litigation of those claims in state court.[75]

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[71] Brandt v. Cortines, 653 N.Y.S.2d 329 [115 Educ. L. Rep. 1019] (N.Y. App. Div. 1997).

[72] Bologna v. St. Marys Area Sch. Bd., 699 A.2d 831 [120 Educ. L. Rep. 1083] (Pa. Commw. Ct. 1997).

[73] Schrimsher v. School Bd. of Palm Beach County, 694 So. 2d 856 [118 Educ. L. Rep. 1265] (Fla. Dist. Ct. App. 1997).

[74] Guilford County Bd. of Comm'rs v. Trogdon, 478 S.E.2d 643 [114 Educ. L. Rep. 959] (N.C. Ct. App. 1996).

A professional employee initiated a grievance seeking four years of administrative seniority for service in the central office as an educational diagnostician in a special education program. After an administrative law judge ruled in the employee's favor, a trial court reversed. On further review, the Supreme Judicial Court of West Virginia affirmed the trial court's decision.[76] The court decided that the diagnostician fit the statutory definition of a teacher because although she performed administrative duties in the central office, she spent most of her time working directly with students administering tests and chairing placement advisory committee meetings where test results were presented and suggestions based on them were implemented. Thus, the court decreed that the employee was not entitled to the administrative seniority that she requested.

Where a school district realigned the grade organization in its schools, a teacher who lost his job claimed that the board did not follow its prescribed procedures for a reduction-in-force. The Supreme Court of South Dakota affirmed that since the teacher failed to object to the findings of fact and conclusions of law or to propose his own alternatives in this regard, he was not entitled to the review normally afforded appeals of board decisions.[77] It added that the trial court's findings of fact clearly supported the board's action in eliminating the teacher's job as a legitimate and legal exercise of its authority.

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[75] San Antonio Indep. Sch. Dist. v. McKinney, 936 S.W.2d 279 [115 Educ. L. Rep. 181] (Tex. 1997).

[76] Putnam County Bd. of Educ. v. Andrews, 481 S.E.2d 498 [116 Educ. L. Rep. 456] (W. Va. 1996).

[77] Sutera v. Sully Buttes Sch. Dist. 58-2, 561 N.W.2d 20 [116 Educ. L. Rep. 1230] (S.D. 1997).

A high school Spanish teacher who taught in three different Kansas school districts between 1983 and 1994 under a series of interdistrict agreements to share faculty worked in one district for eight years, a second for two years, and a third for one year. Although the teacher had previously taught in the third district for a number of years earlier, the district denied the teacher's request for a hearing after non-renewing his contract on the basis that he did not meet tenure requirements of three consecutive years of service. The teacher unsuccessfully filed suit in federal trial court claiming that the district violated his rights to due process and equal protection. On appeal, the Tenth Circuit affirmed.[78] The court observed that since the district contracted with the teacher under a series of explicit one-year-employment agreements that were in place for only one school year, he lacked a protected property interest in continued employment that would have entitled him to due process.

In New York, a probationary music teacher whose contract was not renewed brought suit alleging that defamatory statements by board members and administrators made at the time of his dismissal violated his liberty interest in his good name. When the state commissioner of education refused both the teacher's appeal and request for a name-clearing hearing, he filed suit in state court. However, the board had the dispute removed to a federal court which granted its motion for summary judgment.[79] The court held that although the teacher alleged most of the elements necessary to maintain an action for the deprivation of a constitutionally protected liberty interest, he failed to produce evidence that he had a hard time finding a job or that his difficulty in procuring employment was caused by the board's action.

Where a school librarian objected to, but complied with, a principal's directive to remove four books from the shelves, she filed a grievance in response to his verbal reprimand. Pursuant to state law, the school board established a four-level grievance procedure. However, the grievance was rejected at all levels. The board denied the grievance at the fourth-level because the librarian filed her request for a hearing more than five school days after she received notice that her third-level claim was rejected. A trial court granted the teacher's motion for mandamus and ordered the board to allow her to proceed with her grievance. On further review, an appellate court in Louisiana affirmed that since the statutory duties imposed on the board were purely ministerial, the teacher had an absolute right to a full hearing before the superintendent and final disposition of her grievance by the board.[80] In addition, since the court found ambiguity in the term "school days," it rejected the board's argument that it should have the unilateral power to interpret provisions of its grievance procedures.

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[78] Munguia v. Unified Sch. Dist. No. 328, 125 F.3d 1353 [121 Educ. L. Rep. 511] (10th Cir. 1997).

[79] Frederico v. Board of Educ. of the Pub. Schs. of the Tarrytowns, 955 F. Supp. 194 [116 Educ. L. Rep. 969] (S.D.N.Y. 1997).

As part of a strike settlement agreement between a union and a board of education, the school calendar was modified by eliminating winter and spring breaks. Subsequently, the board dismissed a tenured teacher who took a vacation trip originally scheduled for what had been the winter break. After a hearing officer ordered the teacher's reinstatement, trial and appellate courts in Illinois affirmed.[81] The latter offered that the hearing officer's directive was not against the manifest weight of the evidence where the superintendent's parameters of policy and procedure for taking leaves during the previously scheduled break were not reasonable and the board failed to provide a hearing that comported with due process.

In the first of three cases where teachers or their families were denied benefits, a school system sought further review of an adjudication granting disability benefits to a teacher during summer recess. The teacher, who was injured at work after being assaulted by a student, received her full salary during her absence. An appellate court in New Jersey reversed in favor of the system.[82] The court reasoned that since the teacher received her full annual salary and her duties ended with the close of the school year, she was not entitled to additional temporary disability benefits for the summer recess period.

A widow and son challenged the rejection of their request for survivors benefits. The survivors sought further review of a ruling that they were not entitled to benefits because there was a term in the teacher's contract providing that they shall be paid upon the death of an employee so long as the deceased had continuously been in active service for the five-year period before his or her death. Here, the deceased completed his fifth year of teaching but died about two months prior to the fifth anniversary of the beginning of his first contract. An appellate court in Colorado affirmed that since the plain meaning of a year is one calendar year or twelve months and the teacher was not in active service for a continuous period of five years, his wife and son were ineligible for survivorship benefits.[83]

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[80] Wilson v. Ouachita Parish Sch. Bd., 694 So. 2d 596 [118 Educ. L. Rep. 1261] (La. Ct. App. 1997).

[81] Board of Educ. of Round Lake Community Schs. v. State Bd. of Educ., 685 N.E.2d 412 [121 Educ. L. Rep. 821] (Ill. App. Ct. 1997).

[82] Outland v. Monmouth-Ocean Educ. Serv. Comm'n, 685 A.2d 68 [114 Educ. L. Rep. 552] (N.J. Super. Ct. App. Div. 1996).

[83] Anderson v. Denver Pub. Sch. Employees' Pension and Benefit Ass'n, 935 P.2d 31 [117 Educ. L. Rep. 742] (Colo. Ct. App. 1996).

Where a department of civil services informed a school district that it could extend health care coverage to domestic partners of employees, the school district opted not to do so. However, the district did continue to extend coverage to dependents. When the district refused a teacher's request for domestic partner coverage for his same-sex partner, he filed suit alleging discrimination based on marital status and sexual orientation. A trial court in New York granted the district's motion to dismiss for failure to set forth a cognizable claim.[84]

Support Staff

In the first of two cases from West Virginia, a school board appealed an order from the trial court directing it to reinstate a custodian and comply with a settlement agreement. The state's high court reversed in favor of the board saying that the trial court had overstepped itself. When a subsequent dispute arose over the terms of the settlement agreement, the custodian brought the matter back to court as a continuation of the prior action. After a trial court ruled in favor of the custodian, the board again sought further review. The Supreme Court of Appeals of West Virginia reversed in favor of the board.[85] The panel acknowledged that once it dismissed the earlier appeal and the settlement agreement did not grant the lower court necessary ancillary jurisdiction, the case was over. The court suggested that the proper procedure would have been for the custodian to institute a new suit.

A secretary who was laid off in a reduction-in-force intervened in a grievance filed by another still-employed secretary, claiming that she was entitled to the job in dispute because she had more seniority than any of the three secretaries involved. An Administrative Law Judge ruled as a matter of law the laid-off secretary had no grounds for her claim. The judge posited that intervention may be used as a shield to defend against a claim but not as a sword to achieve a remedy that could only result from filing a separate grievance. After a trial court affirmed the secretary's dismissal as a party to the grievance, she sought further review. The Supreme Court of Appeals of West Virginia reversed in mandating that the blanket application of a "shield-yes/sword-no" policy would contradict the legislative directive that grievance procedures be simple, expeditious, and fair.[86] The court indicated that the secretary should not have been dismissed, that an intervenor in a grievance filed under state law may make affirmative allegations for relief as well as defensive claims, and that a hearing examiner may generally limit an intervenor's claims.

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[84] Funderburke v. Uniondale Union Free Sch. Dist. No. 15, 660 N.Y.S.2d 659 [120 Educ. L. Rep. 239] (N.Y. Sup. Ct. 1997).

[85] Hanson v. Board of Educ. of Mineral County, 479 S.E.2d 305 [114 Educ. L. Rep. 1259] (W. Va. 1996).

[86] Hale v. Mingo County Bd. of Educ., 484 S.E.2d 640 [118 Educ. L. Rep. 510] (W. Va. 1997).

A school security guard who was dismissed due to her excessive absences successfully filed a bill of complaint alleging that the board acted arbitrarily and capriciously insofar as it granted her application for leave but fired her for abusing the leave policy. On appeal, the Supreme Court of Virginia reversed in favor of the board.[87] The court found that the board had repeatedly warned the guard about her lack of attendance at work and how her excessive absenteeism compromised the school security program before firing her. The court added the board had the right to terminate the guard's employment for just cause supported by substantial evidence.

Two related cases involved a former New Jersey school custodian who sued local governmental entities and officials asserting constitutional and statutory claims based on allegations that his position was eliminated because of his political associations and activities. The federal district court granted summary judgment for the first superintendent who had not voted on the school board's budget cuts but had, in fact, opposed them.[88] The court granted the second superintendent's motion for summary judgment since the custodian failed to set forth facts to support his allegations that others conspired to deprive him of constitutional rights or that he was a member of a protected class.[89]

A school district's tax collector unsuccessfully challenged the denial of his application for membership in the state's retirement system. An appellate court in Oklahoma affirmed in favor of the board.[90] The court agreed that since the tax collector was an independent contractor rather than an employee of the district, he was ineligible to participate in the retirement system.

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[87] School Bd. of Norfolk v. Wescott, 492 S.E.2d 146 [121 Educ. L. Rep. 1188] (Va. 1997).

[88] D'Aurizio v. Palisades Park, 963 F. Supp. 378 [118 Educ. L. Rep. 921] (D. N.J. 1997).

[89] D'Aurizio v. Palisades Park, 963 F. Supp. 387 [118 Educ. L. Rep. 930] (D. N.J. 1997).

[90] Crummins v. Commonwealth Pub. Sch. Emps. Retir. Bd., 685 A.2d 232 [114 Educ. L. Rep. 558] (Pa. Commw. Ct. 1996).

School District Contracts

Goods and Services

As expected, the resolution of disputes over the acquisition of goods and services often turn on principles of contract law. A private corporation that prepared an application for impact aid sued a school board to recover payment for services rendered under a contract signed by the superintendent. The board denied that the superintendent could enter into the contract even though it authorized him to submit the application that led to receiving the additional funding. After a trial court entered judgment on a jury verdict for the district, the issue on appeal was the jury instructions. An appellate tribunal in Oklahoma reversed in favor of the corporation.[91] According to the court, absent proper jury instructions that an official has power necessarily inferred as incidental to express authority and the binding effect of the acceptance of contractual benefits, the jury was misled into believing that the agreement was invalid because it lacked formal board approval that was unnecessary under the circumstances.

A board of education that was sued by a contractor for work allegedly due on window replacement contracts counterclaimed for defective workmanship. A central issue was whether the contracts required the company to use a procedure known as "back puttying" in installing the windows. After a trial court entered judgment on a jury verdict in favor of the contractor, the board was about to consider a proposal to settle all disputes with the company when it discovered evidence that the contractor bribed one of its employees to make a statement that "back puttying" was not required under the contract. As such, an appellate court in New York reversed and remanded in favor of the board.[92] The court pointed out that the verdict in the contractor's favor could not stand in the face of previously unavailable post-trial evidence that its principal bribed a board official to provide an interpretation of a contract specification that favored its position. The court added that if the allegations of bribery were proved on remand, they would preclude the contractor from recovering on the contracts.

Where five districts jointly established and operated an area vocational-technical school, they agreed to equal voting power in the governance structure even though financial contributions were based on the number of students per system. When the district that paid about three-fifths of the cost sought to end its participation, a dispute arose over the terms of the agreement. The district argued that it could terminate its involvement after thirty years while the others contended that no changes could be made without a majority vote. After a trial court granted the district's motion for summary judgment, an appellate panel in Pennsylvania affirmed.[93] It observed that since the language of the agreement was clear and unambiguous, there was no disputed question of fact, and no error of law or abuse of discretion, there was no reason to disturb the ruling of the trial court.

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[91] Education Serv. Center of Okla., Inc. v. Independent Sch. Dist. I-1, 932 P.2d 37 [116 Educ. L. Rep. 445] (Okla. Ct. App. 1996).

[92] Prote Contracting Co. v. Board of Educ. of N.Y.C., 657 N.Y.S.2d 158 [118 Educ. L. Rep. 433] (N.Y. App. Div. 1997).

In Ohio, an electrical contractor brought a breach of contract action against a district for additional expenses incurred because of delays in erecting a school facility. The district moved for summary judgment on the ground the claims were barred by express language in the construction contract. A federal trial court denied the district's motion since there were genuine issues of material fact pertaining to each of the clauses in the contract.[94]

Under New Mexico's procurement code, when the central purchasing office of a local public body terminates a contract that it determines was awarded in violation of the law, the contractor must be compensated for actual expenses reasonably incurred and a reasonable profit as long as there was no fraud or bad faith involved. When a school board rejected a contractor's request for compensation under a contract that was declared in violation of the law, a trial court granted its motion for summary judgment. The principal issue on appeal was whether the board was relieved of its duty to compensate a contractor when a court, rather than the central purchasing office, asserts that a contract is unlawful. An appellate court reversed in favor of the contractor on the basis that the duty to compensate still exists.[95] It declared that under the procurement code, when a court rules that a central purchasing office erroneously concluded that a contract was lawful, it shall be deemed to have entered a revised finding that the award was invalid regardless of whether the judiciary orders a new determination.

Bidding

In the first of a pair of cases from New York, the second-lowest bidder sued a school district seeking to vacate a contract for window replacements awarded to a competitor. The controversy arose because the winner, who submitted two bids, wrote the name of a different window manufacturer on the top of each bid. After a trial court dismissed the case, an appellate tribunal affirmed on the basis that nothing prohibited a party from submitting two bids, they were separate and distinct, and the board could properly accept the lower bid and reject the higher.[illegible]

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[93] Wyoming Valley West Sch. Dist. v. Northwest Sch. Dist., 695 A.2d 949 [119 Educ. L. Rep. 531] (Pa. Commw. Ct. 1997).

[94] JWP/Hyre Electric Co. v. Mentor Village Sch. Dist., 968 F. Supp 356 [119 Educ. L. Rep. 876] (N.D. Ohio 1996).

[95] Hamilton Roofing Co. v. Carlsbad Mun. Sch. Bd. of Educ., 941 P.2d 515 [120 Educ. L. Rep. 294] (N.M. Ct. App. 1997).

A district awarded a school roofing contract to a contractor whose sealed bid was delivered to the purchasing office prior to the deadline but was not included at the public bid opening. Upon realizing that the sealed bid had arrived prior to the deadline, purchasing officials opened it and awarded the contract to that firm. The next lowest bidder unsuccessfully claimed that the board violated state competitive bidding laws. A trial court in New York dismissed the petition.[illegible] The court concluded that the intent of the competitive bidding laws was best served by allowing the award to stand, especially since there was no evidence of irregularities in the process that would have undermined fairness or competition.

The second-lowest bidder on a construction contract protested an award where the winner listed multiple subcontractors on the bid form. The disappointed bidder contended that the listing was not only unresponsive but also violated state law. An appellate court in South Carolina affirmed that the award, that was properly listed alternative subcontractors, did not render the bid unresponsive.[illegible]

Where a board entered into an agreement with a building and construction trades council requiring contractors to be bound by a building project labor agreement, a builders' association sued claiming that this violated the statute governing competitive bidding for school districts. When a trial court granted the board's motion to dismiss, the association filed a direct appeal from the judgment of dismissal and a certiorari appeal. An appellate court in Minnesota held that the board's award of contracts for construction projects was not a quasi-judicial matter reviewable by certiorari.[illegible] In fact, it pointed out that the state supreme court did not exempt board actions from the fundamental requirement that decisions of an executive body must be quasi-judicial to be reviewable by certiorari. The court also made it clear that such acts are limited to administrative decisions based on evidentiary facts.

[illegible] N.E.P. Glass v. Board of Educ. of Morrisville-Eaton Cent. Sch. Dist., 649 N.Y.S.2d 537 [114 Educ. L. Rep. 281] (N.Y. App. Div. 1996).

[illegible] Statewide Roofing, Inc. v. Eastern Suffolk Bd. of Coop. Educ. Serv., 661 N.Y.S.2d 922 [120 Educ. L. Rep. 1134] (N.Y. Sup. Ct. 1997).

[illegible] Ray Bell Constr. Co. v. School Dist. of Greenville County, 478 S.E.2d 67 [114 Educ. L. Rep. 333] (S.C. Ct. App. 1996).

[illegible] Minnesota Ass'n of Builders and Contractors v. Board of Educ., 567 N.W.2d 761 [120 Educ. L. Rep. 802] (Minn. Ct. App. 1997).

School District Facilities

Church leaders sued a school district claiming that the refusal of administrators to permit them to use the gymnasium in a middle school for weekly religious services violated their constitutional rights. Although the facilities were available for a variety of community purposes, including discussion of religious topics, board policy prohibited their being used for religious services or religious instruction. A federal trial court in New York granted the district's motion for summary judgment. On further review, the Second Circuit affirmed.[100] The court agreed that since the auditorium was a limited public forum and the rule against religious services and instruction was reasonable and viewpoint neutral, the policy did not violate either the Establishment or Free Exercise Clauses. The court added that insofar as the policy, as applied, did not impinge on any fundamental right, it also did not violate the Equal Protection Clause.

A high school student in California appealed the dismissal of her suit alleged that administrators violated her rights by denying her religious club the opportunity to meet during the lunch period like other pupil-led organizations. On further review, the Ninth Circuit reversed in favor of the student.[101] The court maintained that since the lunch period is noninstructional time within the meeting of the Equal Access Act, simply allowing the religious club to meet on school premises did not violate the Establishment Clause. The court added the student's rights under the Act superseded those under the state constitution, refuting the argument that the district had advanced as a compelling reason in denying the student's request.

Citizens unsuccessfully sued a board of education contending that it was constitutionally impermissible to permit nonstudents to disseminate Bibles and other religious materials in public schools during class hours. The Bibles were placed on tables within common areas of the building with signs reading "Take one if you like." A federal district court in West Virginia vacated a preliminary injunction while denying a request for it to become permanent.[102] The court was of the opinion that this free expression of private religious speech in a nonpublic forum that was opened for limited purposes was consistent with the teaching mission of the school and did not violate the Establishment Clause. The court reasoned that the citizens wanted to enforce an impermissible viewpoint discrimination against religious materials that the board decided were consistent with the purpose of the nonpublic forum. It added that permitting private persons to make Bibles available in schools was not impermissible government endorsement of religion under either the neutrality or endorsement tests adopted by the Supreme Court. At the same time, the court denied the citizens' motion to restore the preliminary injunction but ordered the board to place a sign on the tables where the Bibles were available that disavowed unequivocally any sponsorship or approval of the distribution project.[103]

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[100] Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207 [121 Educ. L. Rep. 892] (2d Cir. 1997).

[101] Ceniceros v. Board of Trustees of San Diego Unified Sch. Dist., 106 F.3d 878 [116 Educ. L. Rep. 82] (9th Cir. 1997).

[102] Peck v. Upshur County Bd. of Educ., 941 F. Supp. 1465 [114 Educ. L. Rep. 82] (N.D. W. Va. 1996).

A student in a private school sought a preliminary injunction to direct public school officials to grant her access to and use of a district's facilities for any event to which its pupils are invited, including, but not limited to, a Halloween party. A trial court rejected the student's motion.[104] The court contended that the student failed to demonstrate a likelihood of success on the merits because state laws granting administrators control over their facilities permitted them to deny her access to a public school program.

In the first of two cases dealing with maintaining safe educational facilities, a school system challenged a declaration that a fire protection district had at least concurrent jurisdiction to conduct annual inspections of its facilities and to order it to comply with its directives. An appellate court in Colorado affirmed.[105] The court held that a fire protection district can order a school system to comply with its orders absent a system's exercise of its statutory authority to contract with a qualified fire inspector.

The second case arose against the backdrop of a trial court's ongoing supervision and enforcement of injunctive relief to compel administrators to rectify violations of District of Columbia fire and safety code provisions in the public schools. The court denied a request to permit approximately fifty schools to open in September 1997 if scheduled roof replacement and repair work were not completed. On further review, an appellate panel affirmed, finding that the trial court had not usurped the authority of the fire chief by rejecting his determination that the roof repair work did not require closure of the buildings if appropriate safety measures were put in place.[106] In addition, the court found that based on the record, it could not substitute its judgment for the heavily factual conclusions in the record over the actual and potential dangers associated with the completion of the work.

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[103] Peck v. Upshur County Bd. of Educ., 941 F. Supp. 1478 [114 Educ. L. Rep. 95] (N.D. W. Va. 1996).

[104] Jacobson v. East Williston Union Free Sch. Dist., 649 N.Y.S.2d 1002 [114 Educ. L. Rep. 611] (N.Y. Sup. Ct. 1996).

[105] West Adams County Fire Protection Dist., v. Adams County Sch. Dist. 12, 926 P.2d [114 Educ. L. Rep. 321] (Colo. Ct. App. 1996).

[106] Parents United for the Dist. of Columbia Pub. Schs. v. District of Columbia, 699 A.2d 1121 [120 Educ. L. Rep. 1110] (D.C. 1997).

Controlling the disposition of school property was at issue in two cases. Where a school district petitioned for approval of private sale of real property, objectors responded that they were entitled to a hearing on the price offered by the potential buyer. A trial court denied the objectors' request for a hearing and issued an order approving the sale. On further review, an appellate court vacated and remanded in favor of the objectors.[107] The appellate court decided that since the hearing sought by the objectors was statutorily required rather than discretionary, the trial court abused its discretion by failing to conduct a hearing on the fairness and reasonableness of the purchase price of the property.

In the second case, the company that was the successor in interest to a donor challenged the denial of its attempt to revoke the donation of land to a district on the ground that the board was no longer using the property for school purposes in accordance with the conditions of the gift. The board argued that since it had not used the property as a school for several years, it could sell the land with impunity. An appellate court in Louisiana agreed that the trial judge was not clearly wrong or manifestly in error in acknowledging that the right to revocation was not prescribed.[108] The court added that the property was still subject to the conditions of the donation and since the board was still using it in accordance with the terms of the act of donation, the gift could not be revoked.

A taxpayer appealed the rejection of his claim against a school board based on his contention that its purchase of real property was not in compliance with state law. The Supreme Court of Florida ultimately ruled that absent allegations of either a constitutional violation or a special injury distinct from other taxpayers, an individual does not have standing to maintain a suit against a public board solely because its action allegedly increases taxes or wastes public money. Even though the taxpayer did not show he suffered a special injury, the court remanded with leave to file an amended complaint asserting a constitutional violation.[109] On remand, an appellate court affirmed that absent a constitutional basis for a challenge, the taxpayer lacked standing.[110]

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[107] *In re* Petition of Bd. of Sch. Dir., 688 A.2d 279 [115 Educ. L. Rep. 985] (Pa. Commw. Ct. 1997).

[108] Orleans Parish Sch. Bd. v. City of New Orleans, 700 So. 2d 870 [121 Educ. L. Rep. 1217] (La. Ct. App. 1997).

[109] School Bd. of Volusia County v. Clayton, 691 So. 2d 1066 [117 Educ. L. Rep. 1141] (Fla. 1997).

[110] Clayton v. School Bd. of Volusia County, 696 So. 2d 1215 [119 Educ. L. Rep. 1276] (Fla. Dist. Ct. App. 1997).

Student Claims of Mistreatment

Sexual Harassment and Abuse

After a teacher was cleared of charges that he sexually abused three of his students while at school, the board of education appealed an order requiring it to indemnify him for his legal expenses. The Supreme Court of New Jersey affirmed.[111] The court ruled that dismissal of the indictment against the teacher satisfied his burden of proof under the indemnification statute.

Where a junior high school student who managed the wrestling team was sexually assaulted by the coach at his home, she and her mother sued him and the district. After a trial court granted the district's motion to dismiss, an appellate tribunal in Illinois affirmed that the claims of negligent hiring and negligent supervision were properly dismissed without prejudice because the student and her mother failed to assert that the alleged negligence was the proximate cause of her injuries.[112] However, the trial court reversed the dismissal of the district's immunity defense since the school district had not complied with the statutory requirement of completing a prehiring criminal background investigation on the coach.

A female student filed a variety of charges in a federal trial court in Pennsylvania claiming that harassment continued even after she made numerous complaints to school administrators. Following title VII as the most appropriate analogue for defining title IX's substantive standards, the court permitted the title IX claim to proceed based on the charge that officials failed to prevent or eradicate a hostile environment that discriminated and limited educational opportunities based on sex.[113] However, in noting that such a claim can only be maintained against the district, not individual defendants, it pointed out that punitive damages were unavailable under federal law. The court dismissed the student's section 1983 claim because the state-created danger theory did not apply and the alleged nonfeasance did not violate her right to due process. The court also rejected the state law tort claims, which came under its supplemental jurisdiction, because they could not be pursued against the district or its employees.

In the second case, an elementary school student and his parents sued the director of transportation and bus driver, both board employees, claiming that the student suffered severe personal and emotional injuries after being sexually abused by other children while riding a school bus. A trial court in Connecticut granted the student's motion to strike the special defenses of statutes of limitations periods because a specific statute provided a longer period for claims of sexual abuse.[114] In addition, the court struck the defenses of governmental immunity since state law prevents municipalities and their employees from claiming that school transportation was a governmental duty and an intervening cause because the defendants had a special relationship with the child requiring them to protect him from intentional harm of others under their supervision. However, the court decided that insofar as the provision of special education services, including transportation, is carried out by the board of education pursuant to a specific state mandate, sovereign immunity barred his negligence claim.

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[111] Bower v. Board of Educ. of E. Orange, 694 A.2d 543 [119 Educ. L. Rep. 176] (N.J. 1997).

[112] Mueller v. Community Consol. Sch. Dist. 54, 678 N.E.2d 660 [117 Educ. L. Rep. 698] (Ill. App. Ct. 1997).

[113] Collier by Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 [117 Educ. L. Rep. 173] (E.D. Pa. 1997).

Timely Filing of Suits or Claims Against the School District

In the first five of the nine actions in this section, courts could not find any justification to make exceptions for the late filings of cases. The driver and passengers in a car that was struck by a school bus challenged the dismissal of their suit for personal injuries and property damage. Pursuant to the state tort claims act, the district denied the plaintiffs' timely written notice of claim by not approving it within ninety days. In light of their concern that they submitted the first claim with the wrong person, the plaintiffs filed a second notice that the district also rejected within the requisite ninety days. When the plaintiffs filed suit, a trial court granted the district's motion for summary judgment based on the fact that the claim was time-barred as it had not been filed within 180 days of when they were denied. An appellate court in Oklahoma affirmed that since the first notice of claims substantially complied with state law, the 180-day period began to run when it was denied.[115] As such, the court asserted that the injured parties could not file suit against the district.

The first of four cases from New York involved a district's request for further review after its suit for tuition reimbursement was dismissed as time barred. An appellate court affirmed.[116] The court agreed that the claim was properly dismissed since the one-year limitations period began running at the conclusion of the school year for which reimbursement was sought, not at the later date when only partial payment was tendered.

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[114] Todd M. v. Richard L., 696 A.2d 1063 [119 Educ. L. Rep. 1087] (Conn. Super. Ct. 1995).

[115] Strong v. Oklahoma City Pub. Schs., 941 P.2d 538 [120 Educ. L. Rep. 299] (Okla. Ct. App. 1997).

[116] Brentwood Union Free Sch. Dist. v. City of New York, 654 N.Y.S.2d 371 [116 Educ. L. Rep. 760] (N.Y. App. Div. 1997).

A former substitute teacher sued her district four months after it denied her application for retroactive membership in a more favorable tier of state retirement system. A trial court rebuffed the teacher's motion to strike the board's affirmative defense that she had failed to file notice of claim within three months of the date the claim accrued.[117] The court posited that since the teacher's action lacked public policy implications that would bring it under a recognized exception to the notice of claim requirement, her application for leave to file a late claim had to be denied because it was filed after the statute of limitations had run.

Where a student was allegedly injured at school, she and her mother challenged the denial of their motion to file a late notice of claim against the district. An appellate division affirmed.[118] The court observed that since district officials had not acquired notice of the essential facts constituting the claim within ninety days of its accrual or within a reasonable time thereafter, the school district would have been substantially prejudiced if it had to defend against the claims.

A former custodial worker unsuccessfully sued a school district for reinstatement and back pay. An appellate court in New York affirmed the denial of the worker's petitions to serve a proper notice of claim and a late claim.[119] The court maintained that the employee did not serve a proper notice of claim since it was presented to the secretary of the associate superintendent rather than the district clerk, the official who represented the district's governing body.

In the remaining four cases, all of which were litigated in New York, courts used a variety of rationales in permitting actions to proceed. A board of cooperative services contracted with a member district to provide labor for a lighting improvement project. The employees worked after regular hours for the cooperative services board but were not compensated at overtime rates. The state commissioner of labor determined that the workers had been underpaid and an appellate division affirmed. On further review, the Court of Appeals of New York affirmed.[120] The court indicated that in enforcement proceedings under state law, the commissioner is not bound by the one-year statute of limitation in the education code. The court added that while the board classified the district's workers as seasonal employees, they did not fall within the common-law exemption from the statutory prevailing wage rate mandate for classified and graded public employees.

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[117] White v. Freeman, 655 N.Y.S.2d 728 [117 Educ. L. Rep. 268] (N.Y. Sup. Ct. 1997).

[118] Gangloff v. East Islip Sch. Dist., 657 N.Y.S.2d 777 [118 Educ. L. Rep. 739] (N.Y. App. Div. 1997).

[119] Sainato v. Western Suffolk BOCES, N.Y.S.2d 43 [120 Educ. L. Rep. 547] (N.Y. App. Div. 1997).

[120] Cayuga-Onondaga Counties Bd. of Coop. Educ. Serv. v. Sweeney, 654 N.Y.S.2d 92 [116 Educ. L. Rep. 749] (N.Y. 1997).

A school bus company sued a district alleging that the over-expenditure of tax moneys when it retracted a bid award and gave it to another transportation service. In lieu of a response, the district unsuccessfully moved to dismiss for failure to file a notice of claim. On further review, an appellate court in New York affirmed.[121] The court offered that in determining the applicability of the three-month notice of claim requirement in proceedings involving school districts, there is a distinction between those seeking enforcement of private rights and those vindicating a public interest because the statute applies to the former but not the latter. The court reasoned that since the purpose of the competitive bidding statute is to protect the public, it was inapplicable in the case at bar.

Where two former high school students were sexually abused by a male teacher, only one of them reported the incident to a school social worker at the time it occurred. Consequently, the teacher resigned and faced criminal prosecution. After a trial court granted both of the students' motions to file late notice of a claim, the district sought further review. An appellate court affirmed that even though there appeared to be no reasonable excuse for delay, the district had knowledge of the essential facts underlying the claims and was not prejudiced by the late filing.[122]

Pursuant to the terms of his collective bargaining agreement, a retired teacher who was hired as a substitute was paid the difference between the per diem rate and a prorated annual salary after twenty consecutive days of service. When the teacher was notified of his continuing employment and pay rate, he unsuccessfully filed suit after the school district rejected his grievance wherein he claimed that he earned less than he did before he retired. A trial court dismissed the teacher's small claims action for unpaid wages.[123] It found that even though the teacher's suit was not timely, he satisfied the notice of claim requirement because of the grievance filed against the district. Even so, the court turned to the merits of the case and ruled that the district was not bound by either an oral or written contract to pay the teacher at his pre-retirement salary rate.

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[121] Mary's Bus Serv. Inc. v. Rondout Valley Cent. Sch. Dist., 656 N.Y.S.2d 534 [117 Educ. L. Rep. 1096] (N.Y. App. Div. 1997).

[122] Kelli "A" v. Galway Cent. Sch. Dist., 660 N.Y.S.2d 228 [119 Educ. L. Rep. 1120] (N.Y. App. Div. 1997).

[123] McGillicuddy v. Rush Henrietta Cent. Sch. Dist., 661 N.Y.S.2d 792 [120 Educ. L. Rep. 780] (N.Y. Just. Ct. 1997).

Conclusion

The cases reported in this chapter address a wide array of school governance issues. Most observers would believe that nearly all of the suits were decided correctly and that few, if any, broke new legal ground. A review of these actions does provide insight into the nature of the litigation that arises over the control of public elementary and secondary education and how the courts have resolved these disputes.

3

PUPILS

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Introduction

The courts continue to grapple with increasingly complex and controversial issues in order to ensure a more equitable balance between the rights of students, the rights of parents to control the education and upbringing of their children, and the duty of schools to provide safe and orderly learning environments within the context of an increasingly diverse society. Among the issues relating to pupils that courts have been asked to address are school attendance, student rights relating to religion, discipline, searches and seizures, sexual abuse/harassment, and desegregation.

Issues Relating to Public School Attendance

Compulsory Attendance

Where a high school student was expelled for twelve months for possession of weapons, the student, by his mother, sought to compel the board of education either to readmit him to regular classes or to provide him with other state-funded educational services. The mother rejected the board's offer of home instruction provided she reimburse the board for the cost of the teacher's time. After a trial court ordered it to deliver educational services, the board appealed. The Supreme Court of Appeals of West Virginia reversed in favor of the board.[1] The court ruled that the law permitting a student's expulsion for up to twelve months, did not violate the state constitutional guarantee of a thorough and efficient education. The court added that where the state can provide reasonable basic educational opportunities and services to a child who has been removed from regular school, there is no compelling interest in a policy of offering the opportunities and services only if the child's parent is able and willing to reimburse it for the cost.

A mother sued a university alleging that its failure to admit her daughter to a laboratory elementary school violated title VI and section 1983. After a federal district court in California entered a preliminary injunction, it conducted a bench trial. In finding that the university's system for selecting students for admission to the laboratory school was subject to strict scrutiny as a governmental classification based on race, the court acknowledged that it was sufficiently narrowly tailored to the compelling state interest of eliminating past discrimination.[2]

In the first of three cases involving home schooling, parents sought to compel a school district to allow their daughter to continue to attend classes on a part-time basis. Previously, the student was permitted to attend selected classes, but a new superintendent required the parents to receive approval from the board. When the board voted to allow only full-time students to attend classes, the parents claimed that it violated their rights. A federal trial court in Oklahoma dismissed in favor of the board when it found that the parents failed to prove an entitlement to a part-time education or home schooling supplemented by attendance in the public schools.[3]

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[1] Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340 [120 Educ. L. Rep. 1212] (W. Va. 1997).

[2] Hunter by Brandt v. Regents of the Univ. of Cal., 971 F. Supp. 1316 [120 Educ. L. Rep. 705] (C.D. Cal. 1997).

[3] Swanson v. Guthrie Indep. Sch. Dist., No. I-1, 942 F. Supp 511 [114 Educ. L. Rep. 118] (W.D. Okla. 1996).

A mother challenged the denial of her request for a declaration that her home-schooled daughter, who was not regularly enrolled in a public school, was eligible to participate in interscholastic sports. An appellate court in New York affirmed the regulations stating a student must be enrolled in the school as an important condition for participation.[4] The court reasoned that despite the superintendent's oversight of the child's home schooling program, she was ineligible for sports since she was not "regularly enrolled" in the district.

When a mother decided to educate her children at home, their father obtained an order compelling her to send the youngsters to school. On further review, an appellate court in North Carolina reversed in favor of the mother.[5] The panel asserted that the trial court lacked the authority to prohibit the mother from home schooling her children as long as her doing so did not interfere with the father's visitation rights.

A juvenile who did not attend school disputed an adjudication that his absences violated the terms of his suspended commitment. An appellate court in Indiana affirmed that the juvenile's right to confront witnesses was not violated by the admission of the school attendance report.[6] The court added that the report was admissible as self-authenticating since the custodian of the records supplied an affidavit that they were kept in the usual course of business and that the school had a duty to record the information.

Transfer of Students

In Texas, a school district appealed a ruling that the law permitting it to transfer to an alternative education program a student after he was detained by the police for conduct punishable as a felony was unconstitutional. The Fifth Circuit reversed and dismissed in favor of the board.[7] The court found that since the student was not denied an education when he was transferred to the alternative program, he could not claim that he was being deprived of a federally protected property or liberty interest.

A district that allowed a student to transfer into its schools for the first eleven years of his education appealed an order compelling it to admit him for his senior year. The Supreme Court of Oklahoma affirmed that since the student, who had previously received transfers, asked for one for his senior year and met the statutory requirements, it had no choice but to approve his request.[8]

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[4] Bradstreet v. Sobol, 650 N.Y.S.2d 402 [114 Educ. L. Rep. 927] (N.Y. App. 3 Dept., Div. 1996).

[5] Elrod v. Elrod, 481 S.E.2d 108 [115 Educ. L. Rep. 1084] (N.C. Ct. App. 1997).

[6] L.H. v. State, 682 N.E.2d 795 [120 Educ. L. Rep. 243] (Ind. Ct. App. 1997).

[7] Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25 [117 EDUC. L. REP. 470] (5th Cir. 1997).

[8] Hill v. Board of Educ. Dist. I-009, 944 P.2d 930 [121 Educ. L. Rep. 362] (Okla. 1997).

Tuition and Fees

Parents of students attending nonsectarian K-12 private schools unsuccessfully tried to enforce the state Tuition Grant Act. The Supreme Court of Georgia affirmed that since the children were not similarly situated to their peers in the public schools, they failed to establish an equal protection claim.[9]

A district sought further review of the denial of its request for tuition reimbursement. An appellate court in New York affirmed on the ground that the district applied for reimbursement after the expiration of the statute of limitation.[10]

Private and Parochial Students

A father initiated an original proceeding in mandamus to compel a county board of education to provide either busing to a parochial school or a stipend to cover the cost of transportation. The Supreme Judicial Court of Appeals of West Virginia denied the father's request in pointing out that even though the legislature did not require boards to offer transportation, they could terminate such services in the face of extreme financial difficulties.[11] The court asserted that the father's request was properly denied insofar as he failed to provide evidence that the board acted arbitrarily or capriciously in terminating the parochial school bus run.

Students in a private school sought to compel a public school district to permit them to participate in its sports program. The federal trial court in Hawaii granted the district's motion for summary judgment.[12] The court decreed that the district's interest in developing the full academic potential of each student through an integrated program of academic courses, elective courses, and extracurricular activities outweighed the pupils' rights to participate in only one part of the program.

Parents of a two-year-old child in a private pre-school challenged the dismissal of their complaint against a school and its employees for alleged sexual contact. An appellate court in Illinois reversed in favor of the parents.[13] The court decided that since a cause of action begins when an adult engages in unwanted touching and unlawful restraint with a minor regardless of whether the child understands the meaning of the actions; the parents could bring independent charges for fraudulent concealment, intentional infliction of emotional stress and civil contempt, but not for negligence.

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[9] Lowe v. State, 482 S.E.2d 344 [116 Educ. L. Rep. 826] (Ga. 1997).

[10] Brentwood Union Free Sch. Dist. v. City of N.Y., 654 N.Y.S.2d 371 [116 Educ. L. Rep. 760] (N.Y. App. Div. 1 Dept. 1997).

[11] State v. Board of Educ. of Summers Co., 478 S.E.2d 341 [114 Educ. L. Rep. 676] (W. Va. 1996).

[12] Office of Hawaiian Affairs v. Department of Educ., 951 F. Supp. 1484 [116 Educ. L. Rep. 229] (D. Haw. 1996).

[13] Doe v. Montessori Sch., of Lake Forest 678 N.E.2d 1082 [118 Educ. L. Rep. 700] (Ill. App. Ct. 2 Dist. 1997).

A student in a private school tried to recover compensatory and punitive damages after she was denied admittance into a Halloween party sponsored by a public school. A trial court in New York denied the student's request for relief since she failed to demonstrate the likelihood of success on merits.[14] The court recognized the long-standing deference of boards to choose whether to grant outsiders access to school buildings since this would effect their ability to close functions and programs including dances, science and book fairs, and field day competitions to non-students.

Substantive Rights of Students

First Amendment Religious Rights

Twelve years after *Aguilar v. Felton*[15] prevented the New York City Board of Education from sending public school employees into religiously-affiliated non-public schools to deliver remedial services under title I, the Supreme Court revisited the dispute. In *Agostini v. Felton*,[16] the Court dropped the presumption that placing public employees in these non-public schools created state-sponsored indoctrination or a symbolic union between government and religion. As such, the Court abandoned the notion that all government aid to sectarian schools is invalid or finances religious indoctrination. In concluding that the delivery of title I services in these non-public schools does not violate the Establishment Clause, the Court reversed and remanded a judgment from the Second Circuit with instructions to vacate the injunction that prevented the programs from being offered in the affected schools.

In a related case, taxpayers and an unincorporated association challenged New York City's practice of providing remedial instruction and support services to students in public and non-public schools. A federal trial court granted the city's motion for summary judgment.[17] The court held that the plan was permissible because it did not create an appearance of state support of religion, did not constitute impermissible subsidization of a sectarian enterprise, and did not create impermissible entanglement of church and state. The court added that there was no special benefit to the religious schools since the mobile instructional units were on neutral sites leased from sectarian organizations and the teachers who worked in them were not under the physical or administrative control of these schools.

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[14] Jacobson v. East Williston Union Free Sch. Dist., 649 N.Y.S.2d 1002 [114 Educ. L. Rep. 611] (N.Y. Sup. Ct. 1996).

[15] 473 U.S. 402 (1985).

[16] 117 S. Ct. 1997 [119 Educ. L. Rep. 29] (1997).

[17] Committee for Pub. Educ. and Religious Liberty v. Secretary, U.S. Dep't of Educ., 942 F. Supp. 842 [114 Educ. L. Rep. 126] (E.D.N.Y. 1996).

A third case from New York involved a church's request for further review of the denial of its attempt to use a middle school auditorium for a weekly worship service. The Second Circuit affirmed that the district acted appropriately because its valid regulation of speech in a limited public forum was reasonable and neutral since it did not single out a particular religion.[18] The court contended that the policy was not subject to strict scrutiny because it neither violated a fundamental right nor the Establishment or Free Exercise Clauses.

In California, a pupil appealed a grant of summary judgment in favor of her district in her suit claiming that her high school violated her rights under the Equal Access Act and First Amendment by denying her religious club the opportunity to meet during lunch even though other student organizations were allowed to meet at this time.[19] The Ninth Circuit reversed on the basis that since lunch is noninstructional time, compliance with the Equal Access Act by allowing the meeting to take place did not violate the Establishment Clause.

A teacher in Georgia unsuccessfully challenged a state law that permits a moment of quiet reflection in public schools. The Eleventh Circuit affirmed that the law satisfied the *Lemon* test.[20] The court agreed that the law had a secular legislative purpose as it supported silent reflection on the day's activities; neither advanced nor inhibited religion, as the announcement by the principal in no way suggested that students should or should not pray; and it did not foster excessive government entanglement since it did not involve prayer for a teacher to monitor.[21]

In a second case involving a moment of silence, a former student and a teacher questioned a school board's practice of opening its meetings with a prayer or a moment of silence. A federal trial court in Ohio granted the district's motion for summary judgment.[22] The court recognized that since the board meeting was fundamentally an adult atmosphere, the prayer did not violate the Establishment Clause.

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[18] Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207 [121 Educ. L. Rep. 892] (2d Cir. 1997).

[19] Ceniceros v. Board of Trustees of San Diego Unified Sch. Dist., 106 F.3d 878 [116 Educ. L. Rep. 82] (9th Cir. 1997).

[20] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[21] Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464 [118 Educ. L. Rep. 28] (11th Cir. 1997).

[22] Coles v. Cleveland Bd. of Educ., 950 F. Supp. 1337 [115 Educ. L. Rep. 926] (N.D. Ohio 1996).

Graduating students and their parents in Florida sued a school district over its policy of permitting prayer at the commencement ceremony. After a federal trial court granted the district's motion for summary judgment, the Eleventh Circuit affirmed.[23] In not reviewing the merits of the trial court's constitutional analysis, the panel determined that the students' claim for declaratory and injunctive relief was moot because they already graduated.

In another case dealing with prayer, a federal district court in Alabama struck down a state law that allowed student-initiated, nonsectarian, nonproselytizing voluntary prayer at school-related events.[24] The court indicated that the law violated the Establishment Clause since it was not enacted for secular purposes, had the primary effect of endorsing religion, and created excessive entanglement between religion and the state.

A teacher and parents in West Virginia sought to enjoin a board's policy of permitting non-students to disseminate Bibles and other religious materials in the schools. A federal trial court vacated a preliminary injunction and maintained that since the policy was consistent with the purpose of a limited forum and did not constitute impermissible government endorsement of religion, it did not violate the Establishment Clause.[25] The court subsequently denied the plaintiffs' request to restore a preliminary injunction while they appealed, but ordered the board to place a sign on the table where the Bibles were distributed stating that it neither sponsored nor endorsed the practice.[26]

Students and their parents in Texas challenged the constitutionality of their district's "Clergy in School" program. Under the program, the district permitted local clergy to enter the schools to discuss concerns and problems with selected students identified by counselors. A federal trial court denied the plaintiffs' request to proceed under fictitious names to avoid harassment and reprisal on the ground that they were not entitled to proceed anonymously.[27]

A Jewish teacher in Maryland who had to use personal leave days to observe Passover questioned the constitutionality of a state law that created a school holiday from the Friday before to the Monday after Easter. The federal district court noted that the law did not violate the Establishment Clause since Easter is a highly secularized holiday and it passed the *Lemon* test.[28] In addition, the court was of the opinion that the law did not violate equal protection since it gave individuals of all religions an extended weekend around a highly secularized holiday.

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[23] Adler v. Duval County Sch. Bd., 112 F.3d 1475 [118 Educ. L. Rep. 39] (11th Cir. 1997).

[24] Chandler v. James, 958 F. Supp. 1550 [117 Educ. L. Rep. 1009] (M.D. Ala. 1997).

[25] Peck v. Upshur County Bd. of Educ., 941 F. Supp. 1465 [114 Educ. L. Rep. 82] (N.D. W. Va. 1996).

[26] Peck v. Upshur County Bd. of Educ., 941 F. Supp 1478 [114 Educ. L. Rep. 95] (N.D. W. Va. 1996).

[27] Doe v. Beaumont Indep. Sch. Dist., 172 F.R.D. 215 [118 Educ. L. Rep. 697] (E.D. Tex. 1997).

Parents successfully challenged a board resolution that would have required teachers to read a disclaimer of the endorsement of the scientific theory of evolution before instruction could take place. A federal district court in Louisiana observed that since the resolution was passed for religious reasons, it violated the Establishment Clause based on its effect of endorsing religion.[29]

First Amendment Freedom of Speech

Students at a public high school in Texas challenged a dress code that prohibited them from wearing rosaries as necklaces. A federal trial court in Texas posited that since wearing such a necklace was a form of religious expression, the school violated the students' First Amendment rights to pure speech.[30] The court was of the view that the dress code, which prohibited gang-related apparel, was vague because officials could not demonstrate sufficient evidence that the behavior of the students would have caused actual or anticipated disruptions.

In Arizona, parents and students refused to comply with a school district's mandatory dress code on the ground that it violated the free speech provision in the First Amendment. When the parents and students entered classrooms without permission to distribute literature disparaging the dress code, school officials procured an injunction to prevent the students from violating the policy. On further review, an appellate court affirmed that the dress code did not violate the First Amendment because it was reasonably related to the school's interests in reducing distractions caused by clothing, increased campus safety, improved school spirit, leveled socioeconomic barriers, ensured that students were dressed appropriately, and reduced the amount of time that staff and faculty spent enforcing the dress codes.[31] In addition, the court offered that school officials provided other means of expression, such as buttons, petitions, and non-uniform days.

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[28] Koenick v. Felton, 973 F. Supp. 522 [121 Educ. L. Rep. 80] (D. Md. 1997).

[29] Freiler v. Tangipahoa Parish Bd. of Educ., 975 F. Supp. 819 [121 Educ. L. Rep. 614] (E.D. La. 1997).

[30] Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659 [121 Educ. L. Rep. 751] (S.D. Tex. 1997).

[31] Phoenix Elem. Sch. Dist. No. 1 v. Green, 943 P.2d 836 [120 Educ. L. Rep. 1170] (Ariz. Ct. App. 1997).

Sexual Abuse and Harassment By Students

Where a sixth grader and her mother in California sued a district and school officials after she was sexually harassed by the student teacher and boys in her class, a federal trial court denied the educators' motions for qualified immunity. On appeal, the Ninth Circuit affirmed.[32] According to the court, since the student's rights under the Equal Protection Clause and title IX were clearly established at the time of the alleged injury, school officials were not entitled to qualified immunity.

In a second case from California, a student and her father requested reconsideration of the partial dismissal of her claim that school officials failed to stop sexual harassment by her peers. Based on the principle that reconsideration can be granted when there is a change in the law, a federal trial court cited several new cases on school liability under title IX for student-on-student harassment and granted her motion.[33]

Acting on behalf of her daughter, a mother in Georgia sued a school board and two officials based on their failure to prevent her daughter from being sexually harassed by another student. After a federal trial court dismissed the suit for failure to state a claim upon which relief could be granted, the Eleventh Circuit affirmed.[34] Upon a subsequent rehearing, the court ruled that title IX did not impose liability against the board based on its failure to remedy a known hostile environment caused by student-to-student sexual harassment.[35]

Following a jury verdict in favor of the defendants, a federal district court in New York denied a former student's request for a new trial in her suit which claimed that she was sexually harassed by her peers.[36] The court ruled that limitations on terminology in describing the school's failure to take appropriate remedial steps did not influence the result of the trial, witnesses did not have to be sequestered, and the presence of a teacher and the superintendent at a hearing did not create a coercive atmosphere that caused witnesses to testify falsely.

In Texas, a federal district court dismissed with prejudice claims brought by a student and her father based on its contention that they were attempting to turn a simple tort action into a constitutional debate.[37] The court found not only that district officials were unaware that the student was sexually assaulted by a peer on school grounds, but also that the plaintiffs failed to provide evidence that educators violated her right to due process by placing her in detention because she was in possession of alcohol.

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[32] Oona, R.-S.- by Kate S. v. McCaffrey, 122 F.3d 1207 [120 Educ. L. Rep. 961] (9th Cir. 1997).

[33] Doe by and through Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415 [115 Educ. L. Rep. 854] (N.D. Cal. 1996).

[34] Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 [106 Educ. L. Rep. 486] (11th Cir.), *opinion vacated*, 91 F.3d 1418 [111 Educ. L. Rep. 1107] (11th Cir. 1996) (en banc).

[35] Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 [120 Educ. L. Rep. 390] (11th Cir. 1997).

[36] Bruneau v. South Kortright Cent. Sch., 962 F. Supp. 301 [118 Educ. L. Rep. 892] (N.D.N.Y. 1997).

The mother of a child who is deaf sued her school and others after her daughter was sexually abused and raped by a fellow student. In acknowledging that the mother had standing, a federal district court in Kentucky declared that student sexual harassment/hostile environment in an educational setting equates to sexual harassment/hostile environment in the workplace.[38] The court ascertained that the test relies on whether the defendant knew or should have known of the harassment and failed to take prompt remedial action. The court added that since Congress abrogated the states' Eleventh Amendment immunity from suits under title IX, the school could be liable for the conduct of its employees. The court concluded that the defendants had immunity with respect to state law tort claims.

The parents of a four-year-old pre-school student who was sexually assaulted and molested in a restroom by a classmate sought further review of the dismissal of their negligence action against the school. An appellate court affirmed.[39] The court asserted that the school was not liable since the incident was unforeseeable.

Sexual Abuse and Harassment By Employees

In the first of four cases from Texas, a school district appealed a judgment in favor of a student who was allegedly sexually abused by a teacher. The Fifth Circuit reversed the denial of the district's motion for judgment as a matter of law and remanded the title IX claim.[40] In deciding that strict liability was inappropriate, the court decreed that the district would be liable if it knew or should have known about the abuse and failed to take remedial action. The court mandated that even though the mother complained to the child's home room teacher about the abuse of her daughter, her claim against the district was insufficient as a matter of law.

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[37] Piwonka v. Tidehaven Indep. Sch. Dist., 961 F. Supp. 169 [118 Educ. L. Rep. 283] (S.D. Tex. 1997).

[38] Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741 [117 Educ. L. Rep. 148] (E.D. Ky. 1996).

[39] Roe v. Catholic Diocese of Memphis, 950 S.W.2d 27 [120 Educ. L. Rep. 854] (Tenn. App. 1996).

[40] Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 [114 Educ. L. Rep. 439] (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2434 (1997).

After a teacher in Texas sexually molested a student at the child's home, his mother sought further review of a grant of summary judgment in her suit against the school district and a variety of educators. The Fifth Circuit affirmed on the ground that since the molestation took place away from school, the district and its administrators were not liable because the teacher was not acting under color of state law.[41]

A school district in Texas challenged an award of compensatory damages in favor of a student based on its failure to prevent the teacher of an after-school karate class from committing sexual abuse. The Fifth Circuit reversed.[42] The court held that the district was not liable under title IX since there was no proof that a school official with a duty to supervise the teacher and the power to end such abuse was aware of the sexual abuse but failed to take immediate and appropriate steps to remedy the situation.

In Texas, a district appealed the denial of its motion to dismiss a suit filed on behalf of a thirteen-year-old girl who was raped and assaulted by a custodian in a classroom after school. Although the custodian had a criminal record, the district had failed to conduct a background check and had not discovered it. Yet, the Fifth Circuit reversed in favor of the district on the basis that the compulsory attendance law did not create a special relationship requiring school officials to protect students from private actors.[43] The court added that the child's parents did not demonstrate that the school officials placed the student in a dangerous situation and that the district's failure to check the custodian's background was not the nexus between the rape and assault that would have been necessary to establish its liability for the pupil's injuries.

A student was sexually abused by a high school teacher over a two-year period, but did not report it to anyone. However, when two of the student's aunts learned of the abuse, the teacher pled guilty to one count of statutory rape. Subsequently, the student filed claims for violations of her civil rights action under section 1983 and sexual harassment under title IX.[44] A federal district court in Tennessee dismissed the section 1983 claim since the student failed to demonstrate that school officials were deliberately indifferent to her right of bodily integrity and the title IX claim because title VII agency principles were inapplicable. On further review, the Sixth Circuit affirmed with regard to section 1983 but reversed on title IX. The court remanded for the application of title VII standards to the sexual harassment claim.

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[41] Becerra v. Asher, 105 F.3d 1042 [115 Educ. L. Rep. 638] (5th Cir. 1997).

[42] Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 [116 Educ. L. Rep. 64] (5th Cir. 1997).

[43] Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412 [118 Educ. L. Rep. 834] (5th Cir. 1997).

[44] Doe v. Claiborne County, Tenn., 103 F.3d 495 [115 Educ. L. Rep. 265] (6th Cir. 1996).

A federal jury in Indiana entered a verdict against a school district for sexual abuse under title IX but did not award compensatory or punitive damages. The court later denied the student's motion for a new trial and the opportunity to interview jurors in light of her allegation that the verdict was a compromise. In judging that there was no evidence of a compromise verdict, the court partially granted the student's motion for attorney fees.[45]

In Pennsylvania, a high school student filed suit against a district and school officials claiming that a policy of deliberate or reckless indifference failed to protect her from sexual abuse by a coach. Specifically, the student alleged that she was deprived of her Fourteenth Amendment right to be free from threats, intimidation, sexual abuse, and misconduct by a school employee and that despite receiving notice of these incidents, the defendants failed to protect her and other female pupils. A federal trial court in Pennsylvania determined that the current principal was entitled to qualified immunity because he personally investigated the reports he received about the teacher's misconduct.[46] However, the court denied the district's motion for summary judgment on the title IX claim since there was sufficient evidence of a policy of deliberate indifference.

The parents of male elementary school students sued a board of education and administrators alleging violations of title IX and other laws with respect to sexual abuse and harassment by a male teacher. A federal district court in Alabama granted the board's motion for summary judgment since its failure to comply with title IX procedural regulations was not an action that discriminates on the basis of sex and/or to promulgate title IX grievance procedures and did not provide a basis for a private cause of action.[47] However, the court denied the board's motion since there were material issues of fact as to whether it complied with other title IX requirements. The court pointed out that the students' failure to allege or produce evidence of a causal link between their schooling and the teacher's sexual advances in their initial complaint did not bar a later *quid pro quo* sexual harassment claim and that their charges were sufficient to put officials on notice of a possible causal link between the teacher's authority and his sexual abuse of students. The court further reflected that there was sufficient evidence to support the claim that school officials acted fraudulently and in bad faith over the teacher's behavior.

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[45] Mary M. v. North Lawrence Community Sch. Corp., 951 F. Supp. 820 [116 Educ. L. Rep. 150] (S.D. Ind. 1997).

[46] Seneway v. Canon McMillan Sch. Dist., 969 F. Supp. 325 [120 Educ. L. Rep. 168] (W.D. Pa. 1997).

[47] Does v. Covington County Sch. Bd., 969 F. Supp. 1264 [120 Educ. L. Rep. 486] (M.D. Ala. 1997).

A student sued both an administrator who sexually molested her while she was a thirteen-year-old in middle school and the school system where he previously had been employed. The student claimed that the first district was at fault because the positive letter of recommendation that the administrator received failed to disclose that he had been disciplined for alleged sexual misconduct with pupils. The Supreme Court of California affirmed that the writer of a letter of recommendation owes prospective employers and third persons a duty not to misrepresent the facts in describing an applicant's qualifications and character if doing so would present a substantial, foreseeable risk of physical injury to the employer or third parties.[48] The court added that the student did not have to rely on the first district's misrepresentations but only had to show that her injuries were caused by her school's reliance on the letter of recommendation.

In North Carolina, a former student sought further review of a grant of summary judgment in his suit for negligent infliction of emotional distress and negligence with respect to sexual abuse he suffered at the hands of two instructors when he was fifteen years old. An appellate court reversed in favor of the student.[49] The court reasoned that since the student suffered from mental illness due to his abuse, his period of incompetence tolled the statute of limitation.

A student who had sexual intercourse with his summer school teacher at her home after class unsuccessfully sued the district.[50] On further review, an appellate court in South Carolina affirmed in favor of the district. The court agreed that the district was not liable insofar as it was unaware of the teacher's inappropriate sexual proclivities and did not have a duty to supervise her conduct outside of the classroom.

In January1993, a mother unsuccessfully filed child molestation charges against the substitute teacher who fondled her daughter in November 1991. An appellate court in Louisiana affirmed in favor of the teacher.[51] The court posited that since the prescriptive period began to run on the date that the mother knew all of the elements of her cause of action, she failed to file the petition in a timely manner.

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[48] Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 [115 Educ. L. Rep. 502] (Cal. 1997).

[49] Soderlund v. North Carolina Sch. of the Arts, 481 S.E.2d 336 [116 Educ. L. Rep. 452] (N.C. App. 1997).

[50] Moore v. Berkeley County Sch. Dist., 486 S.E.2d 9 [118 Educ. L. Rep. 1222] (S.C. Ct. App. 1997).

[51] Bowers v. Orleans Parish Sch. Bd., 694 So. 2d 967 [118 Educ. L. Rep. 1276] (La. Ct. App. 4 Cir. 1996).

Two former high school students were sexually abused by a male teacher, and one of them reported the incident to a school social worker when it occurred. Consequently, the teacher resigned and faced criminal prosecution. After a trial court granted the students' motions to file late notice of claim, the district sought further review. An appellate court affirmed that even though there appeared to be no reasonable excuse for delay, the district was not prejudiced by the late filing since it had knowledge of the essential facts underlying the claims.[52]

Privacy

Parents filed a variety of civil rights charges against child welfare personnel in connection with a child abuse investigation. A federal trial court in Missouri dismissed in favor of the defendants.[53] The court indicated that employees of the school district did not violate any established rights in reporting conditions of child abuse and in releasing the student to juvenile officers without first notifying his parents. The court dismissed other allegations based on qualified immunity, absolute immunity, and failure to state a claim.

In Illinois, a teachers' union unsuccessfully filed suit under the Freedom of Information Act (FOIA) to compel a school district to disclose the names and addresses of students and parents. An appellate court in Illinois affirmed the information was not subject to disclosure under FOIA.[54] The court noted that releasing the names and addresses of citizens for unsolicited home mailings would have invaded their personal privacy.

When four juveniles who were guilty of delinquency violated the conditions of their release by being absent from school without permission, they sought to prevent the state from using their attendance records as evidence of their misbehavior. An appellate court in Florida ruled in favor of the students.[55] The court agreed that the attendance records were not subject to disclosure based on the students' rights to privacy.

The American Civil Liberties Union (ACLU) sought further review of a grant of summary judgment under which a school district did not have to honor its request for copies of records. An appellate court in Washington reversed in favor of the ACLU.[56] The court observed that since the ACLU was located more than 100 miles away from the district, it was entitled to have the copies sent to it in the mail.

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[52] Kelli "A" v. Galway Cent. Sch. Dist., 660 N.Y.S.2d 228 [119 Educ. L. Rep. 1120] (N.Y. App. Div. 3 Dept. 1997).

[53] Hawley v. Nelson, 968 F. Supp. 1372 [119 Educ. L. Rep. 944] (E.D. Mo. 1997).

[54] Local 1274, Ill. Fed'n of Teachers v. Niles Township Sch. Dist. 219, 678 N.E.2d 9 [117 Educ. L. Rep. 692] (Ill. App. Ct. 3 Dist. 1997).

[55] F.A.T. v. State, 690 So. 2d 1347 [118 Educ. L. Rep. 536] (Fla. Dist. 1 Ct. App. 1997).

[56] ACLU of Wash. v. Blaine Sch. Dist. No. 503, 937 P.2d 1176 [118 Educ. L. Rep. 785] (Wash. Ct. App. Div. 1 1997).

A student who was competing with a classmate for a scholarship challenged the dismissal of her suit to gain access to the other pupil's interim grade report. An appellate court in Wisconsin affirmed that the grades were exempted from disclosure under the state's Open Records Law.[57]

Search and Seizure

In California, a high school student appealed the dismissal of his section 1983 action in which he claimed that a search ordered by a vice-principal that revealed he was carrying knives required individualized suspicion. The student also charged the search was unreasonable since each student in the group of suspected smokers was searched individually over a two-hour period. The Ninth Circuit affirmed both that the vice-principal was protected by qualified immunity and that the search was reasonable.[58]

Two eight-year-old second grade students in Alabama, who were strip searched by a counselor and teacher in an attempt to recover seven dollars that was missing from a classmate's purse, sought further review of a grant of summary judgment in favor of the defendants. The Eleventh Circuit affirmed.[59] The court was of the opinion that it was unclear whether the teacher and counselor should have known that their conduct was unreasonable under the Fourth Amendment, and they were entitled to qualified immunity.

A student sued a police officer, town, school guidance counselor, and district alleging violations of due process and unreasonable seizure of her person. The federal district court in Maine pointed out that the guidance counselor may be liable for violating the student's substantive due process rights for interrogating her about her parents' behaviors.[60] The court added that the counselor may be liable for an unreasonable seizure of the student that separated her from her parents after they were arrested. The court did not find the town, police officer, or district at fault over the substantive due process or unreasonable seizure claims.

In Virginia, a father brought a section 1983 action on behalf of his ninth-grade son against the principal and school board alleging that they violated his constitutional rights by searching the backpacks of students,

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[57] State *ex rel.* Blum v. Board of Educ. of Sch. Dist. of Johnson Creek, 565 N.W.2d 140 [119 Educ. L. Rep. 256] (Wis. Ct. App. 1997).

[58] Smith v. McGlothlin, 119 F.3d 786 [120 Educ. L. Rep. 145] (9th Cir. 1997).

[59] Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821 [118 Educ. L. Rep. 867] (11th Cir. 1997).

[60] Grendell v. Gillway, 974 F. Supp. 46 [121 Educ. L. Rep. 127] (D. Me. 1997).

A federal trial court stated that since searching nineteen backpacks for a pair of missing sneakers violated the Fourth Amendment, all references to the student's suspension for refusing to cooperate should be expunged from his record.[61] Further, the court offered that since the principal acted reasonably under the circumstances, he was immune from monetary damages.

The state appealed a motion to suppress evidence that a student concealed a nine-inch knife in his clothes while on school property. The Supreme Court of Wisconsin reversed and remanded in favor of the state.[62] According to the court, the search by a school liaison officer at the request of administrators only required reasonable suspicion and was not overly intrusive. The court added that the safety measures, including the search in the officer's office, related to evaluating whether the student was carrying a dangerous weapon on school grounds.

When a student turned to leave a school building after seeing that he would have to pass through a metal detector, he was stopped by a police officer and admitted possessing a gun. Subsequently, the state sought further review of a motion quashing the student's arrest and suppressing the evidence that he was carrying a gun at school. An appellate court in Illinois affirmed that the seizure was inadmissible because it was not based on reasonable suspicion.[63]

A student challenged his adjudication as delinquent when police discovered that he was carrying a loaded semi-automatic handgun on school premises during an after-prom dance. An appellate court in New Mexico reversed in favor of the student.[64] The court was of the view that the search was inappropriate because even though the student was in wrongful possession of alcohol, the police lacked probable cause to look for the weapon.

In Oregon, after the police officer who was called in to search the jacket of a fourteen-year-old student discovered marijuana in his pocket, the pupil challenged his being placed within the jurisdiction of the juvenile court on the ground that his original detention by a teacher and the vice-principal constituted a stop and the discovery of the marijuana was the result of an illegal search.[65] An appellate court affirmed the legality of the search. The court found that even though the detention constituted a stop, it was justified by reasonable suspicion.

A student who was adjudicated delinquent for possessing marijuana, an offense that would have been a misdemeanor if she had been an adult, sought further review. An appellate court in Indiana reversed in favor of the student.[66] The court held that a school security officer's search of the student, which included reaching into her pockets merely because she arrived late for class, was not justified in light of her age, gender, and the nature of the infraction.

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[61] DesRoches by Des Roches v. Caprio, 974 F. Supp. 542 [121 Educ. L. Rep. 164] (E.D. Va. 1997).

[62] In Interest of Angelia D.B., 564 N.W.2d 682 [118 Educ. L. Rep. 1191] (Wis. 1997).

[63] People v. Parker, 672 N.E.2d 813 [114 Educ. L. Rep. 920] (Ill. App. Ct. 1996).

[64] State v. Tywayne H., 933 P.2d 251 [116 Educ. L. Rep. 1234] (N.M. App. 1997).

[65] State *ex rel.* Juvenile Dep't of Washington County v. Rohlffs, 938 P.2d 768 [118 Educ. L. Rep. 1218] (Or. Ct. App. 1997).

In the first of three cases from Florida, an assistant principal received reports from students that another pupil offered to sell them drugs escorted the accused student to his office where a school officer was working at the desk. When the assistant principal asked the student to empty his pockets, he discovered a bag of marijuana and reported it to the officer. In a delinquency proceeding against the student, a trial court suppressed the evidence on the basis that in light of the officer's presence, the assistant principal needed probable cause for the search. On further review, an appellate court reversed in favor of the state.[67] The court maintained that the officer was coincidentally in the office and did not participate in the search. In addition, the court asserted that even though school board police officers need only reasonable suspicion to investigate, his actions were supported by probable cause.

A student challenged his adjudication as delinquent for carrying a concealed weapon on school grounds and possession of a firearm by a minor. An appellate court in Florida affirmed that multiple counts of delinquency did not create double jeopardy.[68] The court contended that the search only needed reasonable suspicion even if a deputy sheriff helped the assistant principal. The court declared that because a search for a gun is different than one for drugs or other contraband on campus, it would be foolhardy and dangerous to expect an administrator who was untrained in the use of firearms to be responsible for a search when a trained officer could be involved.

When an assistant principal saw students huddled together, he observed that one had money in his hand and another fiddled with his pocket. As such, he took the students to the principal's office where they and their belongings were searched. After marijuana was discovered in one student's wallet, the student challenged his adjudication as delinquent. An appellate court in Florida reversed in favor of the student on the ground that the search was not justified at its inception since the assistant principal neither saw contraband nor an exchange.[69] The court added that the search of the wallet was inappropriate since it was not reasonably related to the objectives of the search and did not relate to seeing a student fiddling with his pocket.

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[66] D.I.R. v. State, 683 N.E.2d 251 [120 Educ. L. Rep. 552] (Ind. Ct. App. 1997).
[67] State v. D.S., 685 So. 2d 41 [115 Educ. L. Rep. 210] (Fla. Dist. Ct. App. 1996).
[68] J.A.R. v. State, 689 So. 2d 1242 [117 Educ. L. Rep. 795] (Fla. Dist. Ct. App. 1997).
[69] A.S. v. State, 693 So.2d 1095 [118 Educ. L. Rep. 1241] (Fla. Dist. Ct. App. 1997).

Instructional Issues

A student sued under title IX and section 1983 when a teacher referred to her as a Neo-Nazi during the first day of a geography class and peers started calling her a Nazi. The student's parents claimed that the name calling was a daily activity and complained that the school had not taken remedial action. A federal district court in Pennsylvania dismissed the title IX claim since any discrimination the student suffered did not stem from her sex.[70] The court ascertained that the school was not at fault as it did not have a policy, practice, or custom of providing a basis for the insults and that the teacher's comments did not constitute discrimination based on national origin. The court concluded that the district was not liable for the students comments' under section 1983.

Parents successfully enjoined the administration of the Texas Assessment of Academic Skills (TAAS) tests unless they were allowed to view a true and correct copy of the test after it was administered and graded. Subsequently, the legislature repealed the statute. On further review, an appellate court decreed that the statute's constitutionality was moot.[71] At the same time, the panel decided that the trial court abused its discretion by denying attorney fees without giving parents an opportunity to present evidence on the issue.

In North Carolina, parents sought to enjoin a school district's policy under which students in grades three to eight would be retained in their current grade if they did not achieve an acceptable score on state-developed standardized tests. A federal trial court denied the parents' request for an injunction because they failed to establish likelihood of success on their claims.[72] Moreover, the court acknowledged that students did not have a property right in being promoted and rejected a title VI claim in the absence of a showing that the policy treated minority children more harshly than other pupils.

Other

After being acquitted on misdemeanor charges of willfully injuing her son by hitting him with a belt at school, a mother in Idaho appealed a grant of summary judgment dismissing her section 1983 action against officials who submitted a report on whether she should face criminal proceedings. The Ninth Circuit affirmed that the mother lacked a clearly established right under the Fourth and Fourteenth Amendments to inflict corporal punishment on her son.[73] The court also affirmed that the defendants were entitled to qualified immunity.

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[70] Nicole K. by & through Peter K. v. Upper Perkiomen Sch. Dist., 964 F. Supp. 931 [118 Educ. L. Rep. 1025] (E.D. Pa. 1997).

[71] Texas Educ. Agency v. Maxwell, 937 S.W.2d 621 [116 Educ. L. Rep. 494] (Tex. Ct. App. 1997).

[72] Erik V. by and through Catherine V. v. Causby, 977 F. Supp. 384 [121 Educ. L. Rep. 1030] (E.D.N.C. 1997).

Parents of a youngster who was home schooled in Utah sought further review of a judgment in favor of a county after their daughter was removed from their home for an interview during an investigation of whether she was a victim of child abuse. The Tenth Circuit affirmed.[74] The court ruled that the county's actions did not violate procedural or substantive due process, equal protection, or the Fourth Amendment.

A dispute in Illinois raised interesting issues about the quality of the school environment. Acting on behalf of students, an advocacy group claimed that districts violated federal and state law by depriving children of minimally safe and adequate educations. After a trial court dismissed the complaint with prejudice for failure to state a cause of action, an appellate tribunal affirmed.[75] However, the court reversed that part of the order making the dismissal with prejudice and remanded to give the plaintiffs an opportunity to amend their complaint.

In the first of two cases from New York, parents requested further review of a grant of summary judgment where a teacher failed to report that their daughter was sexually abused outside of school. An appellate court reversed in favor of the parents.[76] The court determined that although the teacher did not have a common law duty to report suspected abuse, she could be liable for breaching her statutory duty to report even if the child had not been abused.

Parents in New York unsuccessfully filed a section 1983 suit when school officials failed to honor their request that a doctor, rather than a nurse, inspect their daughter before she could be readmitted to class after showing symptoms of head lice. The court granted the school system's motion to dismiss on the ground that the parents suit was so devoid of merit that it failed to state a justiciable cause of action.[77]

A fourteen-year-old sought further review of his conviction for incest after he had intercourse with his thirteen-year-old sister because the detective who interviewed him in an office at his school failed to read him the Miranda warning prior to taking the testimony. An appellate court in Washington reversed in favor of the student on the ground that he had the same right against self-incrimination as an adult.[78]

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[73] Sweaney v. Ada County, Idaho, 119 F.3d 1385 [120 Educ. L. Rep. 149] (9th Cir. 1997).

[74] J.B. v. Washington County, 127 F.3d 919 [121 Educ. L. Rep. 926] (10th Cir. 1997).

[75] Lewis v. Spagnolo, 679 N.E.2d 831 [119 Educ. L. Rep. 571] (Ill. App. Ct. 1997).

[76] Kimberly S. M. v. Bradford Cent. Sch., 649 N.Y.S.2d 588 [114 Educ. L. Rep. 284] (N.Y. App. Div. 4 Dept. 1996).

[77] Kampfer v. Gokey, 955 F. Supp. 167 [116 Educ. L. Rep. 963] (N.D.N.Y. 1997).

In Minnesota, a district challenged the denial of its motion for summary judgment after it was sued by a student who was raped by a stranger in her high school's locker room. The student alleged that officials failed to provide adequate supervision or enforce appropriate rules and policies and that even though several employees noticed the individual around the school prior to the rape, they did not take action against the intruder. An appellate court affirmed in favor of the student.[79] The court agreed that the district was not protected by statutory or vicarious official immunity with regard to the acts of its employees.

Sanctions For Student Misconduct

Generally

In Kentucky, a district appealed the denial of its motion for summary judgment based on qualified immunity where parents filed a civil rights action after a teacher paddled their son for fighting in school with a classmate. The Sixth Circuit reversed in favor of the district.[80] The court reasoned that neither the principal nor the assistant principal violated the student's constitutional rights and that even if the teacher had, they were not clearly established at the time.

A high school student filed a section 1983 claim when he was dismissed from the school's marching band for missing a performance because he was participating in a music festival celebrating his ethnic and cultural background. A federal trial court in New York granted the school district's motion for summary judgment.[81] The court posited that the student did not have a protectable property interest in participation in the marching band.

In the first of two cases from Texas, parents filed a discrimination suit claiming that administrators violated the rights of their bi-racial teenager since he was treated differently than other students when he was disciplined at school. A federal trial court granted the district's motion for summary judgment when it indicated that there was no evidence that school officials discriminated against the student.[82]

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[78] State v. D.R., 930 P.2d 350 [115 Educ. L. Rep. 522] (Wash. Ct. App. 1997).

[79] S.W. v. Spring Lake Park Sch. Dist. No. 16, 566 N.W.2d 366 [119 Educ. L. Rep. 1177] (Minn. Ct. App. 1997).

[80] Saylor v. Board of Educ. of Harlan County, Ky., 118 F.3d 507 [119 Educ. L. Rep. 834] (6th Cir. 1997).

[81] Mazevski v. Horseheads Cent. Sch. Dist., 950 F. Supp. 69 [115 Educ. L. Rep. 885] (W.D.N.Y. 1997).

[82] Jackson v. Katy Indep. Sch. Dist., 951 F. Supp. 1293 [116 Educ. L. Rep. 214] (S.D. Tex. 1996).

A federal trial court in Tennessee denied a county's motion for summary judgment in a section 1983 claim filed on behalf of former students who were isolated in small supply rooms as punishment for leaving their high school without permission.[83] The court ruled that since board policies were linked to this form of punishment, the county may be liable.

A basketball player was suspended from the team until the board decided whether to conduct a hearing to consider whether he violated his high school's rules by possessing alcohol on a school-sponsored bus trip. The player's father unsuccessfully sought to enjoin the enforcement of the penalty. On further review, an appellate court in Louisiana affirmed that the student received appropriate due process and did not have the right to seek redress from the board.[84] The court also found that it would not interfere with a coach's discretion in disciplining his players.

A student who made obscene remarks to a teacher challenged his adjudication as delinquent. An appellate court in Georgia affirmed.[85] The court agreed that there was sufficient evidence beyond a reasonable doubt that the student was guilty of violating the city's disorderly conduct ordinance.

In the first of two cases from Florida, a student who was adjudicated delinquent for making bomb threats sought further review of an order requiring him to make restitution for the expenses of teacher and administrative salaries for the time missed from class. An appellate court reversed on the issue of restitution.[86] The court reflected that since restitution is appropriate only where there is damage or loss, it was unnecessary in the case at bar because the school did not suffer an increased financial burden insofar as teachers and administrators continued to perform their jobs and receive their regular salaries.

A student challenged her adjudication as delinquent for violating a state law prohibiting disruption of educational institutions. The student had lead a group into a school office, waved her hands, and yelled obscenities at the police officer who arrested her brother. An appellate court in Florida affirmed that the law was neither over broad nor unconstitutionally vague.[87]

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[83] Orange v. County of Grundy, 950 F. Supp. 1365 [115 Educ. L. Rep. 938] (E.D. Tenn. 1996).

[84] Bonner v. Lincoln Parish Sch. Bd., 685 So. 2d 432 [115 Educ. L. Rep. 219] (La. Ct. App. 1996).

[85] In Interest of D.A.D., 481 S.E.2d 262 [116 Educ. L. Rep. 449] (Ga. Ct. App. 1997).

[86] B.D.A. v. State, 695 So. 2d 399 [119 Educ. L. Rep. 292] (Fla. Dist. Ct App. 1997).

[87] M.C. v. State, 695 So. 2d 477 [119 Educ. L. Rep. 296] (Fla. Dist. Ct. App. 1997).

Suspension and Expulsion

Students were throwing rocks at their junior high school and one of the rocks struck the car window of the assistant principal. The assistant prinicipal called the police. The police placed the responsible student in the custody of a county youth services officer until his mother picked him up. Rather than have her son receive a ten-day suspension, the mother chose to have him placed in an alternative school. Subsequently, the mother filed suit against school officials and others alleging that her son was excluded from a federally assisted program due to race, that he was subjected to involuntary servitude in violation of the Thirteenth Amendment, that he was denied procedural due process when disciplined, and that he was discriminated against on the basis of race since he received harsher discipline than similarly situated Caucasian students. A federal district court in Tennessee granted summary judgment on behalf of the defendants. On further review, the Sixth Circuit affirmed on all issues except procedural due process.[58] The court remanded since no evidence had been presented to demonstrate whether the student received due process when he was disciplined.

A student in Iowa had a small cross tatooed on her hand removed rather than be suspended for wearing a gang related symbol, but then appealed a grant of summary judgment in favor of the district when she challenged the board's policy. The Eighth Circuit reversed in holding that the student had standing to challenge the policy.[59] The court noted that the policy was void for vagueness because it inadequately defined gang related symbols while providing school officials and police with too much discretion in identifying such marks. The court added that the student failed to exhaust her state remedies over her due process claim.

When a student was suspended for nine days for displaying a four-inch Confederate flag at lunch, his mother filed suit claiming that school officials violated her son's rights of free speech, assembly, due process, and equal protection. A federal trial court in Florida conceded that the complaint sufficiently alleged that the school had an unconstitutional custom or policy even though there was only a single incident of wrongful conduct.[60] However, the court dismissed claims against school administrators and board members in their individual and official capacities and refused to exercise jurisdiction over a malicious prosecution claim since it was not part of the same controversy.

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[58] Buchanan v. City of Bolivar, Tenn., 99 F.3d 1352 [114 Educ. L. Rep. 25] (6th Cir. 1996).

[59] Stephenson v. Davenport Community School Dist., 110 F.3d 1303 [117 Educ. L. Rep. 443] (8th Cir. 1997).

[60] Denno v. School Bd. of Volusia County, 959 F. Supp. 1481 [118 Educ. L. Rep. 170] (M.D. Fla. 1997).

A student claimed that officials violated her constitutional rights when she was removed from her high school when, after serving a five-day suspension for rude and disruptive conduct, she refused to follow the principal's order to apologize to her teacher in front of the class. A federal trial court in Georgia granted the district's motion for summary judgment.[91] The court believed that requiring the student to apologize did not violate her First Amendment rights, that she lacked a fundamental right to attend school, that the five-day suspension did not violate her right to substantive due process, and that administrators did not deprive her of procedural due process.

In a second case from Georgia, a senior who was permanently expelled for cheating prior to graduation sought further review of a grant of summary judgment in favor of her high school when she sued it for breaches of fundamental fairness, due process, and contract. An appellate court affirmed that the school's action in expelling the student for violating its academic honor code neither breached their contract nor violated the concept of fundamental fairness.[92] The court asserted that the expulsion was a reasonable exercise of administrative and academic discretion.

Parents of a student who was suspended for misappropriating computer disks were convicted of truancy when they removed their children from school and engaged in home schooling. Subsequently, the parents filed suit against the district claiming that school officials violated an array of their constitutional rights. A federal district court in Michigan dismissed all of the complaints on the ground that they were barred by the three-year statute of limitations for section 1983 claims.[93]

A student who was expelled for possessing a handgun on school property unsuccessfully filed a section 1983 suit alleging violations of his Fourth, Fifth, and Sixth Amendments rights. The federal district court in Kansas ascertained that there was no basis for claims against the superintendent or police chief based on constructive knowledge of the alleged violation.[94] Further, the court maintained that the student failed to state a claim against the police officer who initiated the search, but had no involvement in his expulsion or the principal who was present, but did not participate in the search.

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[91] Kicklighter v. Evans County Sch. Dist., 968 F. Supp. 712 [119 Educ. L. Rep. 918] (S.D. Ga. 1997).

[92] Blaine v. Savannah Country Day Sch., 491 S.E.2d 446 [121 Educ. L. Rep. 852] (Ga. Ct. App. 1997).

[93] Hartfield v. East Grand Rapids Pub. Schs., 960 F. Supp. 1259 [118 Educ. L. Rep. 257] (W.D. Mich. 1997).

[94] James by and through James v. Unified Sch. Dist. No. 512, 959 F. Supp. 1407 [118 Educ. L. Rep. 161] (D. Kan. 1997).

In the first of two cases from Illinois, a student who was expelled after confessing that he brought a blow torch to his elementary school and gave it to another pupil filed suit claiming that the police officer who interrogated him about the resulting fire violated his rights under the Fourth, Fifth, and Sixth Amendments. A federal trial court granted the district's motion to dismiss the Fifth and Sixth Amendment claims since it had not established policies to implicate itself under section 1983.[95] At the same time, the court denied a motion to dismiss the Fourth Amendment claim until such time as there was a record to evaluate the reasonableness of the officer's conduct in questioning the student.

The state sought further review of the denial of its petition for the adjudication of wardship over a student who was expelled for a single instance of aggravated assault and battery on his high school principal. An appellate court in Illinois reversed in favor of the state.[96] The court offered that instituting a wardship action after the student was expelled did not violate his double jeopardy rights.

In Kansas, a student challenged his extended suspension for pointing a pellet gun at friends while on school property. Even though the friends knew that it was a pellet gun and laughed, a parent saw it and reported the incident to school officials. An appellate court affirmed that the student's conduct disrupted school and impinged on the rights of others.[97] The court relied upon the principal's testimony that since parents and students have a right to feel safe at school, the young man's actions infringed on their rights.

Where a student used vulgar language on a school bus, his father chose to have him suspended for three days rather than be paddled. When a trial court denied the father's petition for a writ of mandamus to compel the school district to reconsider the suspension, he appealed. The Supreme Court of Arkansas reversed on the ground that the district's violation of its procedural guidelines undermined the student's due process protections.[98] The court added that the student had a clear statutory right to challenge or appeal his suspension.

In the first of two cases from Nebraska, a school district appealed a trial court's reduction of a student's expulsion for carrying a knife on campus from two semesters to one. The Supreme Court of Nebraska reversed in favor of the district.[99] The court declared that since the student did not have a fundamental state or federal right to an education, the district acted within its statutory authority insofar as the evidence supported his expulsion.

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[95] Bills v. Homer Consol. Sch. Dist. No. 33-C, 967 F. Supp. 1063 [119 Educ. L. Rep. 488] (N.D. Ill. 1997).

[96] *In re* S.J., 684 N.E.2d 1009 [121 Educ. L. Rep. 799] (Ill. App. Ct. 1997).

[97] Spencer v. Unified Sch. Dist. No. 501, 935 P.2d 242 [117 Educ. L. Rep. 752] (Kan. Ct. App. 1997).

[98] Richie v. Board of Educ. of Lead Hill, 933 S.W.2d 375 [114 Educ. L. Rep. 688] (Ark. 1996).

A student challenged his two-semester suspension for causing a mark on another student when he placed a metal fork against the student's neck as they rode on a school van. After a trial court reduced the expulsion to one semester, the district and student cross-appealed. The Supreme Court of Nebraska reversed in favor of the student.[100] The court contended that the board exceeded its statutory authority under a state law that provided that personal injury caused by accident did not constitute grounds for expulsion.

When a student was expelled for one year for carrying a firearm on school property, he sought a writ of mandamus to compel the board to provide some form of alternative education. The Supreme Court of Appeals of West Virginia affirmed a ruling in favor of the student.[101] The court decreed that the "thorough and efficient" clause in the state constitution required school districts to provide alternative educational programs for students who are suspended or expelled from regular education programs for one year.

A student who was expelled for eighty days for bringing a gun to school challenged the board's refusal to recognize the credits he earned as part of a home study program. An appellate court in Ohio affirmed in favor of the board.[102] The court indicated that the board's action was not arbitrary or capricious since it notified the student that even though it would provide him with assistance during his absence, he could not earn credit during his expulsion.

In New York, a board challenged the Commissioner of Education's order to expunge all references to the five-day suspension a student received for disseminating an obscenity-filled publication at school. An appellate court in New York reversed in favor of the board.[103] According to the court, the Commissioner acted arbitrarily and capriciously since there was overwhelming evidence of the student's guilt.

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[99] Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807 [115 Educ. L. Rep. 1054] (Neb. 1997).

[100] Spencer v. Omaha Pub. Sch. Dist., 566 N.W.2d 757 [120 Educ. L. Rep. 287] (Neb. 1997).

[101] Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909 [118 Educ. L. Rep. 518] (W. Va. 1996).

[102] Commons v. Westlake City Sch. Bd., 672 N.E.2d 1098 [114 Educ. L. Rep. 618] (Ohio Ct. App. 1996).

[103] Board of Educ. of Monticello Cent. Sch. Dist. v. Comm'r Educ., 652 N.Y.S.2d 412 [115 Educ. L. Rep. 419] (N.Y. App. Div. 1997).

A second case from New York involved the reconsideration of the twenty-day suspension that an elementary school student received for possessing a knife on school premises. An appellate court affirmed on the ground that the evidence was sufficient and the penalty was not excessive.[104]

Where a student was expelled for using a controlled dangerous substance on school grounds, his parents sought further review. An appellate court in Maryland affirmed that the student was not entitled to special statutory procedures for children with disabilities absent a previous finding that he was disabled.[105] The court added that the student's admission of substance abuse use was not protected by the statute prohibiting use of such statements by those seeking drug counseling.

A board challenged the reinstatement of a student it expelled for bringing a knife to school. Even though it posited that the case was moot, an appellate court in Indiana reversed in favor of the board.[106] In light of the fact that the case involved an issue of public importance that was likely to recur, the court pointed out that the board had not acted arbitrarily or capriciously.

In Pennsylvania, a middle school student sought further review of his permanent expulsion for selling stolen property and for possessing marijuana and cigarettes. An appellate court reversed in favor of the student.[107] The court ruled that the penalty was inappropriate since it was not permitted under the school's disciplinary code.

Two students challenged their suspension for the remainder of the semester for violating their school's "zero tolerance" drug policy. A trial court acknowledged that the suspension did not violate state law but granted one of the students' request for injunctive relief. An appellate tribunal in Oklahoma dismissed the students' appeals as moot.[108] The court was of the view that since the student who was granted the injunction was not an aggrieved party within the meaning of the law, he was not entitled to an appeal. Turning to the student who was denied injunctive relief, the court observed that his case was moot because he had already served his suspension.

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[104] Mandell v. Board of Educ. of Syosset Cent. Sch Dist., 662 N.Y.S.2d 598 [121 Educ. L. Rep. 292] (N.Y. App. Div. 1997).

[105] Miller v. Board of Educ. of Caroline County, 690 A.2d 557 [116 Educ. L. Rep.1072] (Md. Ct. Spec. App. 1997).

[106] Board of Sch. Trustees of the Muncie Comm. Sch. v. Barnell, 678 N.E.2d 799 [117 Educ. L. Rep. 1101] (Ind. Ct. App. 1997).

[107] Hamilton v. Unionville-Chadds Ford Sch., 693 A.2d 655 [118 Educ. L. Rep.416] (Pa. Commw. Ct. 1997).

[108] LaRue v. Noble Indep. Sch. Dist. No. 40, 946 P.2d 277 [121 Educ. L. Rep.1158] (Okla. Ct. App. 1997).

Desegregation

Desegregation Plan Oversight

The Seventh Circuit reviewed a comprehensive remedial decree under which a federal trial court in Illinois stated that a school district intentionally discriminated against minority students.[109] The court struck down those parts of the order which called for minority teacher goals, ability grouping, closing the gap in test scores between white and minority students in four years, and forbidding the district from referring a higher percentage of minority students for discipline. The court reasoned that limiting minority enrollment in remedial programs was impermissible as it was a benign form of discrimination. However, the court upheld that part of the order calling for funds to build new school facilities.

In the first two major cases involving the ongoing litigation in Kansas City, Missouri, the Eighth Circuit affirmed that a federal trial court properly reinstated an extended day program and disallowed a variety of budget cuts.[110] The court reversed and remanded for reconsideration of whether desegregation funds could be used for marketing and recruitment efforts directed solely at attracting students from non-public schools who lived within the district's boundaries.

Missouri moved for a declaration of unitary status and the approval of a transition plan that would lead to its dismissal from the litigation in Kansas City. A federal trial court largely denied the state's motion for a declaration of unitary status but approved the agreement between it and the school district.[111] On further review, the Eighth Circuit affirmed that the trial court did not err in concluding that the district failed to achieve unitary status with respect to student assignments, transportation, facilities, and faculty and staff assignments.[112] The panel also agreed that the trial court did not err in granting the state's motion with regard to extra curricular activities and did not abuse its discretion in approving the settlement agreement between the state and school system.

The federal trial court in Kansas approved Kansas City's motion for a declaration of unitary status and an order of dismissal of the desegregation case. The court noted that the district achieved unitary status because it complied in all areas including student attendance patterns, faculty, staff, transportation, extracurricular activities, and facilities.[113] Further, the court was of the opinion that administration, faculty, parents, students, and the community achieved collaborative success through detailed planning, cooperation, and participation.

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[109] People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205, 111 F.3d 528 [117 Educ. L. Rep. 473] (7th Cir. 1997).

[110] Jenkins by Jenkins v. State of Mo., 103 F.3d 731 [115 Educ. L. Rep. 302] (8th Cir. 1997). *The court also awarded attorney fees to the plaintiffs in contesting the state's petition for certiorari:* Jenkins by Jenkins v. State of Mo., 115 F.3d 554 [118 Educ. L. Rep. 859] (8th Cir. 1997).

[111] Jenkins v. State of Mo., 959 F. Supp. 1151 [118 Educ. L. Rep. 117] (W.D. Mo. 1997).

[112] Jenkins by Jenkins v. State of Mo., 122 F.3d 588 [120 Educ. L. Rep. 930] (8th Cir. 1997).

Following the denial of its request for a declaration of unitary status, the school district of Denver, Colorado, filed a second motion. When the federal trial court terminated its jurisdiction, the plaintiffs appealed. At issue was whether the provision in the state constitution which prohibited assignment of students to achieve racial balance violated the due process clause. The Tenth Circuit dismissed the appeal,[114] deciding that the constitutionality of the clause was not ripe for review. The court added that the plaintiffs lacked standing to challenge a finding that the clause did not violate due process.

In a case from Mississippi, the Eleventh Circuit affirmed that a trial court did not err in judging that the board of education proved that racial imbalances in its schools were the result of voluntary housing patterns and demographic changes.[115] As such, the court asserted that the district had achieved unitary status because it eliminated the vestiges of *de jure* segregation with commitment to and compliance with the desegregation plan.

On remand after the Supreme Court[116] permitted a trial court to withdraw its jurisdiction incrementally in a desegregation case, both parties appealed when a federal trial court in Georgia awarded some of the plaintiffs' attorney's fees. The Eleventh Circuit affirmed that the trial court[117] could not confer fees relating to a prior appeal since a timely petition was not filed and that awarding fees for post judgment monitoring was not abuse of its discretion.[118]

In a long-running case from Texas, a district moved for approval of the actions of a variance committee used to monitor teacher assignments in order to eliminate racially-identifiable schools. The Fifth Circuit approved the actions of the committee when it agreed that the proposed system of assignments satisfied the requirement that the district achieve maximum desegregation practicable in placing teachers.[119]

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[113] United States v. Unified Sch. Dist. No. 500, Kansas City, 974 F. Supp. 1367 [121 Educ. L. Rep. 226] (D. Kan. 1997).

[114] Keyes v. School Dist. No. 1, Denver, Colo., 119 F.3d 1437 [120 Educ. L. Rep. 158] (10th Cir. 1997).

[115] Lockett v. Board of Educ. of Muscogee County Sch. Dist., 111 F.3d 839 [117 Educ. L. Rep. 487] (11th Cir. 1997).

[116] Freeman v. Pitts, 503 U.S. 467 [72 Educ. L. Rep. 717] (1992).

[117] Mills v. Freeman, 942 F. Supp. 1449 [114 Educ. L. Rep. 173] (N.D.Ga. 1996).

[118] Mills by Mills v. Freeman, 118 F.3d 727 [119 Educ. L. Rep. 844] (11th Cir. 1997).

[119] Tasby v. Gonzalez, 972 F. Supp. 1065 [120 Educ. L. Rep. 1030] (N.D. Tex. 1997).

Where a five-year-old student was denied admission to a neighborhood school because it reached its cap for students of Chinese descent under an earlier desegregation decree, his father filed a section 1983 suit to have it dissolved. A federal district court in California denied the father's motion for summary judgment.[120] The court refused to dissolve the decree based on its finding that there were issues of fact as to whether termination was justified.

Plaintiffs in a long-running desegregation case in Alabama sought a determination of whether the state board of education, governor, state superintendent, and state board members were defendants in local offshoots of the original case.[121] The court ascertained that the defendants were still part of the action even though they ceased participating in local cases.

The first of two cases from Florida was filed by an unincorporated association and two students who sought damages and injunctive relief based on a school board's allegedly racially discriminatory practices. A federal trial court mandated that since the association failed to establish that any of its members suffered an injury in the case, it lacked standing.[122] Turning to the students, the court decreed that while they lacked standing to seek equitable relief from practices that they were no longer subject to, they could proceed if they could show that the board continued to practice intentional discrimination.

A school district in Florida moved for unitary status based on its claim that it eliminated vestiges of past discrimination by complying with and showing commitment to the desegregation plan.[123] A federal trial court granted the district's motion and ended its twenty-seven years of jurisdiction over the case.

Cross-district Remedies

A school board in Indiana appealed the denial of it motion to lift an injunction and the accompanying order that it continue to bus school children from city to suburban areas. The Seventh Circuit vacated and remanded in favor of the board.[124] The court maintained that since the most recent order modified the original injunction, it was appealable without regard to finality. Further, the court offered that the district could present evidence establishing its achievement of unitary status.

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[120] Ho by Ho v. San Francisco Unified Sch. Dist., 965 F. Supp. 1316 [119 Educ. L. Rep. 158] (N.D. Cal. 1997).

[121] Lee v. Lee County Bd. of Educ., 963 F. Supp. 1122 [118 Educ. L. Rep. 944] (M.D. Ala. 1997).

[122] Citizens Concerned About Our Children v. School Bd. of Broward County, 966 F. Supp. 1166 [119 Educ. L. Rep. 415] (S.D. Fla. 1997).

[123] United States v. Board of Public Instruction of St. Lucie County, 977 F. Supp. 1202 [121 Educ. L. Rep. 1037] (S.D. Fla. 1997).

[124] United States v. Board of Sch. Comm'rs of Indianapolis, 128 F.3d 507 [121 Educ. L. Rep. 966] (7th Cir. 1997).

In the first of three cases involving the ongoing desegregation litigation in St. Louis, the state appealed an order that appointed a settlement coordinator and denied its motion for a stay while it challenged the denial of its motion for unitary status. The Eighth Circuit dismissed.[125] It indicated that since the trial court's order appointing a settlement coordinator and its judgment on the motion to alter or amend the same were interlocutory, they could not be characterized as appeals from orders denying an injunction. The court added that the denial of the motion for a stay pending further review was not appealable.

The Career Education District, created to help desegregate vocational schools in St. Louis, sought further review of a declaration that the district failed to achieve unitary status. The Eighth Circuit remanded for a formal hearing accompanied by comprehensive and detailed findings of fact and conclusions of law.[126]

The state appealed the denial of its motion to end efforts to recruit and admit new students into a voluntary interdistrict transfer plan (VITP) in St. Louis and to relieve it of funding obligations for these pupils. The Eighth Circuit affirmed that the trial court did not abuse its discretion in denying the motion to end the VITP pending settlement negotiations.[127] However, the panel contended that if the negotiations reached an impasse, the district court should immediately act on the pending motion for unitary status.

The first of two cases from Arkansas to reach the Eighth Circuit involved a dispute between two school districts over payments associated with implementing a majority-to-minority transfer plan. The Eighth Circuit affirmed that the plan was valid.[128] The court held that pooling based on the number of majority-to-minority transfer students better met the requirements of the settlement agreement than a proposed plan based on the total number of interdistrict transfers.

Teachers in Arkansas sought further review of an order requiring them to end a strike against a school district that was subject to a consent decree in a desegregation case. The Eighth Circuit reversed in favor of the teachers.[129] The panel ruled that the trial court lacked the authority to enjoin the strike since it could not show that the teachers' action was aimed at interfering with the desegregation order. The court added that a strike cannot be characterized as a modification of a consent decree since such a change can only be accomplished by a judicial order, not the parties. Finally, the court stated that nothing in the consent decree could be read as denying the teachers their right to strike.

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[125] Liddell by Liddell v. Board of Educ. of St. Louis, 105 F.3d 1208 [115 Educ. L. Rep. 645] (8th Cir. 1997).

[126] Liddell by Liddell v. Board of Educ. of St. Louis, 121 F.3d 1201 [120 Educ. L. Rep. 668] (8th Cir. 1997).

[127] Liddell by Liddell v. Board of Educ. of St. Louis, 126 F.3d 1049 [121 Educ. L. Rep. 530] (8th Cir. 1997).

[128] Little Rock Sch. Dist. v. North Little Rock Sch. Dist., 109 F.3d 514 [116 Educ. L. Rep. 897] (8th Cir. 1997).

A federal district court in Louisiana denied a school board's request to split up into three independent systems because it failed to comply with an earlier order to achieve unitary status.[130] The court found that the proposed plan was unacceptable since it would have hindered the process of school desegregation.

Conclusion

The chapter focused on constitutional and statutory concerns with regard to students in American public and private schools. Courts will continue to refine and interpret the role of schools concerning religion, school safety, and discipline. As the courts are increasingly recognizing districts' unitary status, desegregation continues to occupy considerable attention. Future litigation may address school choice and vouchers. Other issues will face new scrutiny with the increasing demographic diversity of the nation and will continue to ensure a plethora of viewpoints and disagreements in these areas.

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[129] Knight v. Pulaski County Special Sch. Dist., 112 F.3d 953 [117 Educ. L. Rep.904] (8th Cir. 1997).

[130] Valley v. Rapides Parish Sch. Bd., 960 F. Supp. 96 [118 Educ. L. Rep. 188] (W.D. La. 1997).

4

BARGAINING

Julie F. Mead

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Introduction

Numerous courts faced issues concerning the relationship between schools and employee unions in 1997. Complaints involving public and private elementary and secondary schools encompassed both constitutional and statutory concerns.

Constitutional Issues

Six cases interpreted the Unite States Constitution in relation to school labor relations. Two cases concerned the religion clauses of the First Amendment, three examined fair use fees through the lens of the First Amendment's right to Free Association, and one scrutinized the constitutionality of statutory changes in reduction-in-force procedures under the Contract Clause and the Fifth Amendment.

First Amendment — Freedom of Religion

The Supreme Court of New Jersey upheld the right of lay teachers in parochial schools to unionize under the state constitution against a challenge that this would have violated both the Establishment and Free Exercise Clauses of the First Amendment.[1] The court applied the three-part test from *Lemon v. Kurtzman*[2] in considering the Establishment Clause claim. It reasoned that the disputed provision of the state constitution serves the secular purpose of advancing the economic welfare of its citizens, the primary effect of requiring private employers to bargain with their employees in such a way that neither advances nor inhibits religion, and avoids excessive entanglement between the state and the church. The court focused on excessive entanglement and found persuasive the experiences of the Diocese of Camden in its relationship with a union of lay teachers at the high school level. The court decreed that since the scope of the high school bargaining agreement was limited to wages, benefits, and terms of employment, there was no danger that religious matters would be subject to negotiations, thereby entangling the state with religion. Likewise, the court noted that the constitutional provision only required employers to bargain with employees and did not create a monitoring system that might result in entanglement.

Turning to the Free Exercise claim, the court ruled that even when applying the most stringent Free Exercise test, the state had the compelling interest of industrial peace and economic order which outweighed any incidental burden on religious freedom. Finally, the court pointed out that the Diocese currently contracts individually with teachers without concerns about free exercise of religion. Thus, the court concluded that bargaining collectively over the terms and conditions of employment would implicate only comparable secular concerns.

The Court of Appeals of New York reached a similar result in a case challenging an order of the State Employment Relations Board (SERB) directing a Catholic high school to bargain with its lay staff and to reinstate a teacher.[3] As in New Jersey, the school objected to the order as a violation of the Establishment and Free Exercise Clauses. However, in this instance, the State Labor Relations Act (SLRA), not the state constitution, was under scrutiny. The court first disposed of the Free Exercise claim. Applying the test articulated by the Supreme Court in *Employment Division, Oregon Department of Human Resources v. Smith*,[4] the judges found that the SLRA was a facially neutral statute of general applicability that employs a secular regulatory regimen. Therefore, according to the court, the SLRA implicated neither religious acts nor beliefs. In reviewing the Establishment Clause question, the court found that there was no excessive entanglement and that even if such an intrusion should arise, the judiciary could provide redress. Finally, it considered the SERB's directive to reinstate a teacher who was discharged for "unchristian behavior." The court affirmed the order of reinstatement because the school could not support its claim. The court stated that the board could only review the record to determine if the school's actions were justified in the record, but the SERB could not inquire into the accuracy of the underlying religious issues. Here, the SERB did not consider whether the teacher had behaved in an "unchristian" manner, only whether some record existed to support the conclusion. The court maintained that since no such record existed and the school could not explain its charge, the SERB properly reinstated the teacher.

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[1] South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus, 696 A.2d 709 [119 Educ. L. Rep. 1035] (N.J. 1997).

[2] 403 U.S. 602, 612-13 (1971). The *Lemon* Test requires: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'" (citations omitted).

[3] New York Employment Relations Bd. v. Christ the King Reg. High Sch., 660 N.Y.S.2d 359 [120 Educ. L. Rep. 226] (N.Y. 1997).

First Amendment — Freedom of Association

The provisions of a collective bargaining agreement including a fair share fee for nonmember teachers came under scrutiny in two cases involving the right to Freedom of Association under the First Amendment. In both actions, the master contracts contained identical language requiring teachers who were not members of the associations to pay fees equal to membership dues. Teachers who did not belong to the associations could request rebates of fees used for political and ideological activities. An appellate court in Indiana declared that the provisions violated the First Amendment because they forced nonmembers to pay fees with only the possibility that improperly deducted amounts would be returned.[5] The court asserted that the association did not have the right to use the money of nonmembers for political or ideological purposes that they might not have endorsed.

Likewise, nonmembers of a teachers' association in Pennsylvania challenged the constitutionality of fair use by raising issues related not only to the calculation of fees but also to the timeliness of the arbitration procedures used to consider their objections. The nonmembers argued that the union violated the First Amendment because the fees covered non-bargaining costs and arbitration did not allow for a reasonably prompt resolution of the dispute by an impartial decision-maker. While a federal district court permitted the nonmembers to pursue the suit with respect to the calculation of fees, the court determined that the nonmembers lacked standing to challenge the arbitration process because they had not invoked their rights to any such proceedings.[6]

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[4] 494 U.S. 872 (1990).

[5] Ford v. Madison-Grant Teachers Ass'n, 675 N.E.2d 734 [115 Educ. L. Rep. 1024] (Ind. Ct. App. 1997); Anderson v. East Allen Educ. Ass'n, 683 N.E.2d 1355 [120 Educ. L. Rep. 785] (Ind. Ct. App. 1997).

Contract Clause and Fifth Amendment

After Congress granted new emergency authority to administrators in the schools of the District of Columbia, the teachers' union alleged that the laws violated the Contract Clause and the Due Process Clause of the Fifth Amendment. Under the changes, Congress gave the superintendent the power to declare each school a "competitive area" wherein teachers would compete for positions only within their buildings rather than follow the past practice of city-wide applications. This modification also allowed principals to consider factors other than seniority in making a reduction in force (RIF). A related provision foreclosed any challenge to the designation of competitive areas or the selection of positions for abolishment or the separation of a teacher under these new sections. Teachers could only complain if they alleged discrimination, retaliation for protected speech, or failure to follow the process established under the new procedures. When the board adopted new procedures for use as part of a RIF, 400 low-rated teachers were laid off based upon school-wide rather than system-wide seniority.

In observing that Congress was not bound by the Contract Clause, the Circuit Court for the District of Columbia affirmed a judgment in favor of the school system since the changes did not impair the contractual relationship between the parties.[7] The court maintained that the board met its obligation under the collective bargaining agreement that required it to consult with the union and that the use of district-wide seniority in previous RIFs was an insufficient rationale to sustain a challenge under the Contract Clause. The court dispensed of the union's objections of procedural and substantive due process under the Fifth Amendment by holding that while the interest of the teachers in keeping their positions was clear, their concern was outweighed by the small chance of factual errors affecting the principals' ratings, the unlikelihood of resolving disputes over those rankings with a pre-termination proceeding, the burden on the district created by conducting 400 hearings and the availability of post-termination relief for errors. The court rebuffed the substantive due process argument in commenting that shifting the power to authorize a reduction in force to principals was clearly rational, did not shock the conscience, and did not oppress anyone.

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[6] Otto v. Pennsylvania State Educ. Ass'n-NEA, 950 F. Supp. 649 [115 Educ. L. Rep. 907] (M.D.Pa. 1997).

[7] Washington Teachers' Union Local # 6 v. Board of Educ. of the Dist. of Columbia, 109 F.3d 774 [117 Educ. L. Rep. 42] (D.C. Cir. 1997).

Recognition and Representational Issues

Two cases examined basic issues of recognition and representation. The association that wanted to represent lay teachers and librarians in a Catholic school sought further review of the Pennsylvania Labor Relations Board's (PLRB) dismissal of its petition to order a representation election. The association argued that lay educators had the right to elect it as their representative pursuant to the definition of "public employees" under the Pennsylvania Employee Relations Act (PERA). The PLRB ruled that the PERA did not apply to the lay teachers as they were employed in a church office or facility that was utilized primarily for religious purposes. The Supreme Court of Pennsylvania affirmed.[8] The court agreed that since the phrase was, at best, ambiguous, and the legislature had not clearly articulated its desire to include the bargaining rights of the educators in question under PERA's ambit, the precedent set in *National Relations Board v. The Catholic Bishop of Chicago*[9] dictated that the Act's jurisdiction could not be extended to cover these employees.

The second case dealing with recognition and representational issues involved a union of administrators. The Supreme Court of Nebraska held that such a union violated state law since it included both principals and administrators whom the principals supervised.[10] The court rejected the reasoning of an appellate tribunal that the union was proper because the union would have helped to avoid fragmenting bargaining units. Instead, the court relied on applicable laws that clearly stated that supervisors and subordinates could not form a single bargaining unit.

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[8] Association of Catholic Teachers Local 1776 v. Pennsylvania Labor Relations Bd., 692 A.2d 1039 [118 Educ. L. Rep. 361] (Pa. 1997).

[9] 440 U.S. 490 (1979).

[10] Papillion/LaVista Schs. Principals and Supervisors Org. v. Papillion/LaVista Sch. Dist. No. 27, 562 N.W.2d 335 [117 Educ. L. Rep. 736] (Neb. 1997).

Rights and Obligations of Exclusive Bargaining Representatives

The rights of unions to expect and engage in good faith bargaining before a school district subcontracts work was at issue in Pennsylvania. School officials notified the union representing its maintenance, grounds, custodial, and transportation employees that it would seek proposals from private contractors to provide the services that its members had delivered. Shortly thereafter, the union requested negotiations on a successor contract with the district and attached its initial request for wage increases. The district never presented a counter offer during bargaining but did inform the union that it received a proposal from a subcontractor that allegedly would have saved it a substantial sum of money. District officials asked for a counterproposal, but before the union could complete one, the district informed it that the purported savings were even greater than its initial estimate. When the district rejected the union's proposals, the union filed a complaint with the PLRB alleging failure to bargain in good faith. After the PLRB and a trial court sustained the union's complaint, the district sought further review. An appellate court affirmed.[11] The court based its judgment on the facts that the district failed to make a counterproposal, shifted the numbers presented as targeted savings, and did not inform the union that it would accept a proposal that matched the expected savings. The court also affirmed the remedial order to rescind the subcontract and reinstate the affected employees with back pay.

Another union defended its right to charge a nonmember teacher fair share fees. The teacher alleged that the union not only erred in calculating fees but also that the documents it used as evidence were conclusory, hearsay assertions of biased union officials. An appellate court in Indiana affirmed a grant of summary judgment in favor of the union.[12] The court pointed out that the union sufficiently documented its fees and that the allegations of hearsay and bias were unsupported by the facts.

In the first of two cases from New York, an appellate court affirmed the denial of an acting principal's claim of unfair representation after she was not given a full-time appointment to the job.[13] The court agreed with the Public Employment Relations Board that since the acting principal was not a teacher, the union did not owe her a duty of fair representation.

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[11] Upper Moreland Township Dist. v. Pennsylvania Labor Relations Bd., 695 A.2d 904 [119 Educ. L. Rep. 524] (Pa. Commw. Ct. 1997).

[12] Hayden v. Linton-Stockton Classroom Teachers Ass'n, 686 N.E.2d 143 [122 Educ. L. Rep. 527] (Ind. Ct. App. 1997).

[13] Jimenez v. United Fed'n of Teachers, 657 N.Y.S.2d 672 [118 Educ. L. Rep. 737] (N.Y. App. Div. 1997).

When a teacher was dismissed due to a disability that stemmed from an on-the-job injury, he sought further review of the denial of his petition to amend a complaint against his school district to include the union. An appellate court affirmed.[14] The court ruled that the teacher could not file an unfair representation complaint against the union since he failed to pursue the grievance procedure outlined by his collective bargaining agreement.

The exclusion of tutors from a union was at issue in a case where the tutors sought to be paid as teachers according to the salary schedule adopted in their district. State Law required tutors with valid teaching certificates be paid relative to their education and years of experience. The Supreme Court of Ohio upheld a grant of mandamus directing the district to pay the tutors at the same rate as teachers.[15] The court determined that because the collective bargaining agreement defined tutors with teaching certificates as teachers for the purposes of the state's salary statutes, a writ of mandamus was appropriate since tutors were not members of the bargaining unit and otherwise lacked access to the grievance procedure.

Scope of Bargaining

The first of only two cases in 1997 dealing with the scope of bargaining considered whether the trial adoption of a year-round school calendar was a mandatory issue of bargaining as a matter of employee hours and working conditions or a permissive topic of educational policy. When the Wisconsin Employee Relations Commission (WERC) posited that the issue fell into the latter category, the union unsuccessfully sought judicial review. An appellate court affirmed that in light of the WERC's vast experience in distinguishing between mandatory and permissive topics of bargaining, WERC's judgment should be reviewed under the most deferential standard thereby affording its conclusions great weight and limiting the court's own authority to overturn only irrational decisions.[16] Accordingly, the court indicated that the WERC properly engaged in balancing the policy interests of the district and its employees. In observing that the school system wanted to try year-round schooling in order to explore achievement gains and cost savings, the court conceded that even though the interests of the teachers were substantially implicated, the district had the ability to make the change because it was primarily a matter of educational policy.

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[14] Prendergast v. Kingston City Sch. Dist., 662 N.Y.S. 2d 141 [120 Educ. L. Rep. 1142] (N.Y. App. Div. 1997).

[15] State *ex. rel.* Kabert v. Shaker Heights City Sch. Dist. Bd. of Educ., 676 N.E.2d 101 [116 Educ. L. Rep. 359] (Ohio 1997).

[16] Racine Educ. Ass'n v. Wisconsin Employment Relations Comm'n, 571 N.W.2d 887 [122 Educ. L. Rep. 1281] (Wis. Ct. App. 1997).

The other case involved a challenge to a new statute that provided for the reformation of Indianapolis Public Schools (IPS), limited the subject matter of bargaining, and contained other provisions affecting teachers. The teachers' association alleged that the law was unconstitutional since it was neither a single subject bill nor a general statute of uniform operation because it applied only to the IPS. An appellate court in Indiana affirmed the constitutionality of the new law.[17] Despite expressing its own disapproval of its compelled finding and sympathy with the position of the association since the provision at issue failed to pass as a separate bill, the court upheld the law because it properly considered a single subject. The court rejected the argument that the bill was unconstitutional because it applied only to IPS on the basis that even though it was a special law, it survived due to the unique circumstances of the IPS.

Grievability and Arbitrability

This section examines fifteen cases. Thirteen actions considered arbitrability while two review procedural issues. Nine of the suits in the first category illustrate the judicial presumption that most employee-employer disputes must be settled through grievance and arbitration procedures.

Presumption of Arbitrability

When a teacher was transferred after receiving a negative evaluation, she only disputed her being moved to another school. The teacher based her claim on language in the agreement between her association and district that limited the challenges that staff members could make when they were dissatisfied with the summating evaluations because such challenges led to adverse employment consequences. After an arbitrator stated that the matter was arbitrable, the district appealed. The Supreme Court of Iowa reversed in favor of the district.[18] The court concluded that insofar as the teacher failed to allege that she suffered from an adverse employment consequence, she could not file a grievance that might lead to arbitration.

Similarly, the Supreme Court of Vermont denied a school district's attempt to remove issues of procedural errors in the implementation of the teacher evaluation provisions of a master contract from arbitration.[19]

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[17] State Teachers Ass'n v. Board of Sch. Comm'rs of Indianapolis, 679 N.E.2d 933 [118 Educ. L. Rep. 1098] (Ind. Ct. App. 1997).

[18] Lewis Cent. Educ. Ass'n v. Lewis Cent. Community Sch. Dist., 559 N.W.2d 19 [116 Educ. L. Rep. 367] (Iowa 1997).

[19] Montpelier Bd. of Sch. Comm'rs v. Montpelier Educ. Ass'n, 702 A.2d 390 [122 Educ. L. Rep. 494] (Vt. 1997).

The district had argued that since the issue raised in a teacher's complaint over the non-renewal of his contract was actually related to the "just and sufficient cause" determination of the board, the arbitrator should not have considered procedural errors. The court rejected the district's position in noting the process outlined in the contract and the question raised in the complaint both encompassed procedures. The district also claimed that procedural errors could only be subject to arbitration if the teacher filed a grievance citing the error at the time it was made, not at the time of non-renewal. In response, the panel asserted that such issues could not be raised for the first time in court when they had not previously been brought to an arbitrator's attention.

In the first of four cases from Pennsylvania, the union representing a teacher who was dismissed due to two unsatisfactory evaluations filed a grievance rather than ask for a hearing before the school board. An arbitrator acknowledged that since the savings clause in the master contract effectively incorporated the school code into the local agreement, the issue fell within his jurisdiction. Consequently, the arbitrator ordered the teacher's reinstatement on the ground the district had made a procedural error. As such, the district successfully challenged the award on the basis that the arbitrator erred in interpreting the savings clause. On further review, the Supreme Court of Pennsylvania reversed in favor of the teacher.[20] The court declared that since the arbitrator's reading of the savings clause fell within the essence of the agreement and was rational, his judgment should have been left undisturbed.

A guidance counselor questioned a school district's appointment of an outside candidate to fill the principalship that she occupied during the principal's illness. The counselor claimed that she was denied the position due to her union activities. In fact, the evidence showed that while the counselor was asked several questions about shifting from a unionized position to a principal's job, the other candidate was not. A trial court affirmed the PLRB's order, directing the district to appoint the counselor to the job with the appropriate pay raise. On further review, an appellate court in Pennsylvania reversed because the counselor lacked the protection afforded by the PERA when, as here, she applied for a managerial position that was not covered by the collective bargaining agreement.[21] The court contended that the bargaining agreement did not include a promotion system covering vacancies for principals and that the counselor had never been offered the job.

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[20] Juniata-Mifflin Counties Area Vocational-Technical Sch. v. Corbin, 691 A.2d 924 [117 Educ. L. Rep. 633] (Pa. 1997).

[21] Uniontown Area Sch. Dist. v. Pennsylvania Labor Relations Bd., 694 A.2d 659 [118 Educ. L. Rep. 1074] (Pa. Commw. Ct. 1997).

A forty-two-year-old teacher accepted a generous early retirement package offered to staff with twenty or more years of service within the district. The board subsequently limited the availability of that retirement package to individuals who were at least fifty-five, thereby making the teacher ineligible. When the teacher filed a complaint, an arbitrator was of the opinion that the district acted in bad faith. On further review, an appellate court affirmed in discovering nothing irrational in the arbitrator's ruling.[22] The court agreed with the arbitrator that insofar as the early retirement package constituted compensation under the contract, it could not be reduced without just cause.

In the final case from Pennsylvania, the union representing food service workers unsuccessfully tried to compel a district to abide by an arbitration award. The district had paid only part of the money that the union claimed it owed its members. A trial court not only denied the union's motion because the PLRB alone could provide the remedy it sought but also granted the district's motion for summary judgment since it lacked jurisdiction over the dispute. On further review, an appellate panel vacated and remanded in agreeing that the trial court properly maintained that it lacked jurisdiction to hear a complaint in equity requesting redress of an unfair labor practice.[23]

Arbitrability was the central issue in a dispute surrounding the denial of a voluntary reassignment. A school district claimed that an arbitration award usurped its managerial authority and that the collective bargaining agreement granted the arbitrator the power to ascertain violations of the contract but not to fashion remedies. An appellate court in Louisiana, in affirming in favor of the union, rebuffed both of the district's arguments.[24] First, it decided that state law requires districts to establish grievance procedures. Second, it likened the district's construction of the bargaining agreement to an unreasonable hypothetical situation in which lower courts could grant remedies, but the supreme court could not. Thus, the court stated that since the bargaining agreement clearly created the arbitrability of disputes as a final step in the grievance procedure, the arbitrator could fashion appropriate remedies as long as they fell within the scope of the contract. The court offered that the arbitrator reasonably discharged his duties in ordering the district to grant the voluntary transfer of a teacher to one of its magnet schools since the directive related directly to contract language which granted such transfers based predominantly on seniority.

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[22] Ringgold Sch. Dist. v. Ringgold Educ. Ass'n, 694 A.2d 1163 [119 Educ. L. Rep. 190] (Pa. Commw. Ct. 1997).

[23] Hotel & Restaurant Employees Int'l Union v. School Dist. of Allentown, 702 A.2d 16 [122 Educ. L. Rep. 245] (Pa. Commw. Ct. 1997).

[24] Orleans Parish Sch. Bd. v. United Teachers of New Orleans, 689 So. 2d 645 [116 Educ. L. Rep. 1320] (La. Ct. App. 1997).

A school district withheld the salary increment from a principal with thirty-one years of service because he missed a great deal of time due to illness during his last two years on the job. The principal filed a grieviance. In response to the principal's grievance, the board argued that the issue should have been taken to the Commissioner of Education because state law provides for arbitration of withheld salary increments unless it is predominantly related to a performance evaluation. The New Jersey Public Employment Relations Commission (PERC) rejected the district's argument and an appellate court affirmed.[25] The court agreed that the issue was subject to arbitration because the board was motivated predominantly by disciplinary, rather than evaluative, concerns.

Another court in New Jersey considered the withholding of a raise from an administrative secretary who had poor attendance due to an ongoing medical problem which required periodic hospitalization. Even though her principal recommended that the secretary no longer be awarded the salary increment, he rated her performance, when in attendance, positively. An appellate court affirmed that the PERC had jurisdiction over the dispute since the district's motivation was predominantly disciplinary.[26]

The first of three cases from New York affirmed that the question of whether a grievance is timely is subject to arbitration.[27] The court reasoned that since the contract at issue did not include any language conditioning arbitration on compliance with time requirements, complaints of departure from those stipulations were arbitrable.

In another case decided on the same day, the same appellate court agreed that a teachers' union prevailed in its challenge to a stay of arbitration.[28] The school district unsuccessfully argued that a teacher's grievance became moot when she retired in order to avoid dismissal. The court affirmed that since the teacher's retirement was involuntary, her complaint was properly subject to arbitration.

A teacher lost his bid to grieve his nonselection as assistant varsity football coach. In reviewing a stay of arbitration, an appellate panel in New York pointed out that there was nothing in the collective bargaining agreement which expressly authorized arbitration in disputes over the appointment of teachers to extracurricular duties.[29] The court found that arbitration was uncalled for since contractual provisions described extra compensation and protected staff from arbitrary dismissals, but did not address their selection.

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[25] Edison Bd. of Educ. v. Principals and Supervisors Ass'n, 701 A.2d 459 [121 Educ. L. Rep. 1075] (N.J. Super. Ct. App. Div. 1997).

[26] Randolph Township Bd. of Educ. v. Randolph Educ. Ass'n, 703 A.2d 381 [122 Educ. Law Rep. 1024] (N.J Super. Ct. App. Div. 1997).

[27] Matter of Kachris (Sterling), 659 N.Y.S.2d 649 [119 Educ. L. Rep. 628] (N.Y. App. Div. 1997).

[28] Matter of Mangee (Mamorella), 659 N.Y.S.2d 653 [119 Educ. L. Rep. 630] (N.Y. App. Div. 1997).

[29] Board of Educ. of Port Jefferson Union Free Sch. Dist. v. Port Jefferson Teachers' Ass'n, 663 N.Y.S.2d 69 [121 Educ. L. Rep. 833] (N.Y. App. Div. 1997).

Where a custodian challenged the denial of his request for a transfer to a vacant position at another school, an appellate court in Massachusetts determined that the state law which authorized principals to hire and fire staff voided provisions of the collective bargaining agreement which vested such authority in the school committee.[10] The court posited that although the statute uses the term "hire," its intent would be thwarted were it not also applied to transfers. Therefore, the court concluded that the custodian's appeal exceeded the scope of the arbitrator's authority.

Procedural Issues

The process for selection of an arbitrator was at issue in a case filed by nonmember teachers who disputed an association's fair use fee. When the nonmembers refused to pay the fee, the association instituted proceedings through the American Arbitration Association (AAA). The AAA does not seek input from either party when selecting an arbitrator. Upon further review, the nonmembers unsuccessfully argued that the rules for Alternative Dispute Resolution (ADR) should have been implemented. An appellate court in Indiana affirmed.[11] The court asserted that since the ADR rules apply only when, unlike the case at bar, the parties to an active case agree to them, the AAA acted correctly in selecting an arbitrator. The court also affirmed the orders under which the fair use fee was calculated and pursuant to which the nonmember teachers were told to make their payments.

A suit from Connecticut considered the scope of the submission to an arbitrator in a disagreement over proposed changes in health insurance carriers. After reaching an impasse, the district and the union submitted the question of whether the proposed coverage was substantially equivalent to the existing policy to arbitration. In establishing that the new coverage was substantially equivalent, the arbitrator included a sentence in her order suggesting that equivalency for out-of-state dependents could be achieved if the benefits were offered at the same rate as in-state benefits. The union unsuccessfully sought judicial review of the last sentence on the basis that it exceeded the submission to the arbitrator. An appellate court affirmed that since both sentences answered the question in the submission, which did not contain any limiting or conditional language, the arbitrator acted within the scope of her authority.[12]

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[10] School Comm. of Lowell v. Local 159, Serv. Employees Int'l Union, 679 N.E.2d 583 [118 Educ. L. Rep. 746] (Mass. App. Ct. 1997).

[11] Anderson v. Yorktown Classroom Teachers Ass'n, 677 N.E.2d 540 [116 Educ. L. Rep. 1135] (Ind. Ct. App. 1997).

Judicial Review of Arbitration Awards

As in years past, parties to labor disputes actively sought judicial review of arbitration awards. These decisions fall into six categories: eight examined disagreements over salary and benefits; four addressed dismissals and nonrenewals; three considered reassignments or transfers; two weighed issues concerning reductions in force; and two analyzed strikes.

Salary and Benefits

A teachers' association unsuccessfully appealed a judgment vacating an award from the Maine Labor Relations Board (MLRB) that directed a school district to adopt a tentative agreement with the union representing its teachers. The Supreme Judicial Court of Maine affirmed that the order was correctly overturned because it was clearly erroneous.[33] The association had complained to the MLRB after the mayor vetoed a tentative agreement that the board had ratified by a vote of four to three. The mayor served as ex-officio chair of the seven-member board of education, could vote only in case of a tie, and had veto authority over expenditures that could only be overridden by a two-thirds vote of the board. The MLRB claimed that since this process conflicted with both the city charter and state law, the board had to ratify the agreement. In rejecting this position, the court noted that the city charter specifically directs the mayor to serve as chair of the board and grants it the authority to set its own rules. According to the court, vesting the mayor with veto authority was clearly within the prerogative of the board and did not create a conflict with the charter. Similarly, the court was satisfied that there was no conflict with state statutes as the process did not divest the board of its authority to set teacher salaries under the laws insofar as the board retained the power to override the mayor's veto.

Where a city council failed to ratify a collective bargaining agreement between a school board and teachers' union, the union unsuccessfully petitioned for a court-ordered confirmation and enforcement of an arbitration award in its favor. On further review, the Supreme Court of Rhode Island affirmed.[34] The court held that since the agreement was enforceable only if ratified by the city council, its failure to do so rendered the contract unenforceable and the board lacked the authority to enter

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[32] Willington Educ. Ass'n v. Board of Educ. of Willington, 699 A.2d 186 [120 Educ. L. Rep. 1079] (Conn. App. Ct. 1997).

[33] Biddeford Bd. of Educ. v. Biddeford Teachers Ass'n, 688 A.2d 922 [116 Educ. L. Rep. 306] (Me. 1997).

[34] Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388 [116 Educ. L. Rep. 703] (R.I. 1997).

arbitration on the issue.[15] In judging that the arbitration award could not be enforced, the court added that the provisions of the previous agreement on dispute resolution expired with the contract.

A school district questioned an arbitration award that granted back pay to teachers who had not been given credit for service as long-term substitutes on their district's salary schedule. An appellate court in Pennsylvania vacated the award.[16] The court declared that state law did not compel the award of back pay because the teachers' salaries exceeded the minimum requirements established by state law. In addition, the court indicated that the term in the master contract requiring teachers to work at least forty-five days to receive an increment for experience did not apply to long-term substitutes. Rather, the court was of the opinion that this term existed to limit the credit available to teachers who returned to work after long-term leaves of absence.

In a second case from Pennsylvania, an appellate court overturned an arbitration award that modified a teacher's retirement benefits.[17] The teacher filed a grievance to increase her retirement benefits after the state legislature passed a statute which, if applied to her, would have given her seven additional years of service and placed her in a category entitling her to substantially greater benefits than under her district's plan. The court ascertained that since the teacher accepted the district's retirement package as payment-in-full prior to the legislative changes, the school system satisfied its obligation to the teacher. The court found that applying the law retroactively would have impaired the district's contractual rights. Therefore, the court maintained that since the arbitrator's award did not draw its essence from the agreement, it was unreasonable.

A teacher's union in Minnesota successfully argued that a school district committed an unfair labor practice by implementing a new salary schedule after an arbitrator acknowledged that the previous one expired and that the board was technically within its rights to create a new one. An appellate court reversed in favor of the district.[18] The court decided that the award was too ambiguous for it either to confirm or to determine if the board acted in bad faith. One part of the award appeared to permit the board's action while other sections appeared to direct the opposite result. As such, the court returned the dispute to the arbitrator for clarification.

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[15] *See* Providence Teachers Union v. Providence Sch. Dist, 689 A.2d 384 [116 Educ. L. Rep. 699] (R.I. 1996).

[16] Penns Manor Area Sch. Dist. v. Penns Manor Area Educ. Ass'n, 697 A.2d 610 [120 Educ. L. Rep. 212] (Pa. Commw. Ct. 1997).

[17] Danville Area Sch. Dist. v. Danville Area Educ. Ass'n, 700 A.2d 549 [121 Educ. Law Rep. 246] (Pa. Commw. Ct. 1997).

[18] Menahga Educ. Ass'n v. Menahga Indep. Sch. Dist. #821, 568 N.W.2d 863 [121 Educ. L. Rep. 297] (Minn. Ct. App. 1997).

In New York, a union sought further review of an order vacating an arbitration award based on past practice that granted a newly hired teacher an extra twenty-five dollars per credit hour of graduate study. While the contract expressly conferred this compensation on teachers employed by the district, it was silent as to the rights of new faculty. An appellate court affirmed in favor of the district.[39] The court observed that an arbitrator can only rely on past practice when considering the meaning of a specific contractual provision related to the dispute or when the agreement expressly permits its incorporation. The court ruled that since neither of these conditions characterized the disputed contract, the arbitrator erred by relying on past practice.

A union in New Jersey challenged the denial of longevity increments to teachers who transferred into their district. According to state law, when a district closes a school and makes an arrangement to serve the affected students, the receiving system must offer positions with no loss of seniority to the closing district's tenured teachers. Here the receiving board refused to offer raises to the incoming teachers based on its belief that eligibility for the increments was based solely on service. An arbitrator asserted that the board's action conflicted with state statutes by denying the teachers the full benefits of seniority. A trial court overturned the award on the basis that the arbitrator should not have considered state statutes as they were the exclusive domain of the Commissioner and State Board of Education. On further review, an appellate court reversed in favor of the union.[40] The court contended that the arbitrator had to apply state statutes in order to assure that an award did not conflict with the law. The court added that the arbitrator acted correctly in decreeing that the district violated state law by denying longevity compensation to the transferring teachers under the master contract.

Dismissal and Nonrenewal

A teacher from Pennsylvania unsuccessfully claimed that his principal violated his First Amendment right to Freedom of Speech when the teacher was punished due to the administrator's mistaken impression that he called the newspaper with negative information about the school.[41] The Third Circuit found that such an allegation, based on a mistake when no speech had occurred, was insufficient to support a First Amendment claim. However, the court suggested that the teacher's claim was sufficient to support a charge under the National Labor Relations Act (NLRA) or the Fair Labor Standards Act since these laws existed to eliminate any atmosphere of intimidation such as he alleged.

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[39] Matter of Franklin Cent. Sch. Dist., 657 N.Y.S.2d 213 [118 Educ. L. Rep. 440] (N.Y. App. Div. 1997).

[40] Board of Educ. of the Buena Reg'l Sch. Dist. v. Buena Reg'l Educ. Ass'n, 693 A.2d 159 [118 Educ. L. Rep. 365] (N.J. Super. Ct. App. Div. 1997).

[41] Fogarty v. Boles, 121 F.3d 886 [120 Educ. L. Rep. 658] (3d Cir. 1997).

In a second case involving the NLRA, both parties sought further review where a teacher in a Catholic school in New York claimed that the nonrenewal of her contract did not comport with the good cause provision of the agreement. Moreover, the teacher charged school officials with violating state and federal law by discriminating against her because she belonged to a union. An appellate court in New York agreed that since the good cause provision attached only when a teacher was dismissed during the term of the contract rather than when her employment contract was not renewed, her claim was without merit.[42] At the same time, the court rejected the school's argument that the state statute prohibiting discrimination based on union membership only applied to unions subject to the NLRA. Rather, the court cautioned that the NLRA protected members of any union, not just those that were subject to its terms.

A school board sought further review of an arbitration award reinstating a football coach with back pay and reducing his suspension to a written warning. The coach was permanently suspended for failing to distribute donated tickets to a professional football game to the students on his team. A trial court maintained that the arbitrator exceeded her authority but refused to vacate the award. An appellate court in Louisiana stated that even though the arbitrator exceed her authority by retaining jurisdiction over the dispute and ordering the district to write a warning letter, it agreed that reinstatement with back pay was a proper remedy.[43] Further, the court determined that by not filing a formal submission agreement as the first step to arbitration, the parties effectively incorporated it into the language of their grievance such that the arbitrator acted within the scope of her authority.

In Washington, a custodian unsuccessfully challenged his dismissal for knowingly violating a district's no-weapons policy by firing an air-powered BB gun on school grounds. After repairing the BB gun at the request of a relative, the custodian test-fired the weapon at a target behind the maintenance facility at 4:30 in the afternoon. An appellate court upheld the custodian's dismissal.[44] The court reasoned that the custodian was properly discharged for unremediable conduct that materially and substantially affected his performance or for behavior that was so clearly unacceptable that he could be dismissed without a prior warning.

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[42] Muhitch v. St. Gregory the Great Roman Catholic Church and Sch., 659 N.Y.S.2d 679 [119 Educ. L. Rep. 632] (N.Y. App. Div. 1997).

[43] Holmes v. Orleans Parish Sch. Bd., 698 So. 2d 429 [120 Educ. L. Rep. 867] (La. Ct. App. 1997).

[44] Wolf v. Columbia Sch. Dist., No. 400, 938 P.2d 357 [118 Educ. L. Rep. 1212] (Wash. Ct. App. 1997).

Reassignment and Transfer

A union sought further review of a ruling overturning an arbitration award that ordered a school district to transfer one of its members into a position as a library aide. When three candidates applied for the position, the district offered it to a non-union member after a member of the union rejected its offer. An appellate court affirmed in favor of the district.[45] The court agreed that the arbitration award conflicted with portions of the bargaining agreement which granted union members consideration for filling vacancies but left the final decision about whether to grant a transfer to the discretion of the superintendent.

Similarly, a school district in New York challenged an arbitration award that required it to promote the union member who was the highest ranked of the three candidates for a job. An appellate court in New York reversed in favor of the district.[46] The court posited that where all three of the candidates were union members, the district properly exercised its discretion in promoting the applicant of its choice. The court held that the district complied with the terms of the bargaining agreement, which incorporated a state law creating a "one in three rule" that balanced union rights with management concerns, by allowing the union to certify and rank three candidates while preserving the system's discretion in selecting any of these choices.

In a second case from New York, an appellate court pointed out that an arbitrator did not exceed the scope of her authority in a dispute over two applicants for a job as faculty manager.[47] The court concluded that awarding the position to the union's applicant did not contravene public policy since both candidates were clearly qualified and the job did not involve classroom teaching.

Reduction-in-Force

A teacher claimed that her school district failed to comply with the RIF procedures in her collective bargaining agreement when she was notified of the non-renewal of her contract two weeks after the date called for in the agreement. At trial, the district successfully argued that it was not bound by the contractual RIF procedures because state law did not expressly enable it to negotiate in this regard. On appeal, the Supreme Court of Idaho reversed in favor of the teacher when it found that state law does not limit what a district may negotiate.[48] As such, the court declared that the district was bound by the procedures in the teacher's contract.

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[45] South Butler County Sch. Dist. v. South Butler County Educ. Support Personnel Ass'n, 696 A.2d 932 [119 Educ. L. Rep. 1074] (Pa. Commw. Ct. 1997).

[46] Matter of Professional, Clerical, Technical Employees Ass'n, 653 N.Y.S.2d 743 [116 Educ. L. Rep. 349] (N.Y. App. Div. 1997).

[47] Matter of Lackawanna City Sch. Dist. (Lackawanna Teachers Fed'n), 654 N.Y.S.2d 540 [116 Educ. L. Rep. 775] (N.Y. App. Div. 1997).

A union sought confirmation of an arbitration award in its favor where a city violated their bargaining agreement by using employees of a subcontractor to fill jobs after it privatized its school lunch program. After an arbitrator ordered the reinstatement of two union members to their jobs, a trial court judged the award irrational but did not call for it to be vacated, modified, or corrected. The Supreme Court of Rhode Island affirmed that the trial judge did not err in refusing to confirm the order, but did remand with directions to vacate the arbitration award.[49]

Strikes

Both disputes involving strikes concerned challenges to a job action by teachers against a school district in Arkansas that was subject to a consent decree in a desegregation case. The district obtained injunctive relief on the theory that the strike thwarted its desegregation efforts and/or constituted a modification of the consent decree. On further review, the Eighth Circuit reversed in favor of the teachers' association.[50] The appellate tribunal observed that the trial court lacked the authority to enjoin the strike since it could not show that the teachers' action was aimed at interfering with the desegregation order. It added that a strike cannot be characterized as a modification of a consent decree since such a change can only be accomplished by the court, not the parties involved. Finally, the court held that nothing in the consent decree could be read as denying the teachers their right to strike.

The second case was filed by taxpayers who unsuccessfully requested an injunction to compel the teachers to return to work. A trial court denied injunctive relief because the plaintiffs failed to show that the strike would cause them irreparable harm. The Arkansas Supreme Court affirmed that the taxpayers' claim was correctly denied.[51] The court rejected the taxpayers' argument that the strike was illegal per se because they made no attempt to show that they were harmed irreparably.

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[48] Hunting v. Clark County Sch. Dist. 161, 931 P.2d 628 [116 Educ. L. Rep. 422] (Idaho 1997).

[49] Rhode Island Council 94, AFSCME, AFL-CIO v. Woonsocket Sch. Comm., 703 A.2d 756 [122 Educ. L. Rep. 1237] (R.I. 1997).

[50] Knight v. Pulaski County Special Sch. Dist., 112 F.3d 953 [117 Educ. L. Rep. 904] (8th Cir. 1997).

[51] Wilson v. Pulaski Ass'n of Teachers, 954 S.W.2d 221 [122 Educ. L. Rep. 334] (Ark. 1997).

Miscellaneous

This section reviews five cases that did not fit any of the above categories. The first two actions concern unusual salary and benefits issues while the final three consider miscellaneous labor disputes.

Salary and Benefits Issues

A school district requested further review of the dismissal of its complaint that provisions in a negotiated contract, which placed no limit on the number of paid days that an employee could receive if necessitated by an on-the-job injury, were barred by state law. The district tried to rely on a law that limited the total number of days of paid leave to no more than twelve days per year. An appellate court affirmed in favor of the union.[52] The court asserted that the dispositive question was whether the supplemental compensation constituted annual leave that was subject to the statutory cap. The court distinguished the supplemental compensation and ruled that, unlike annual leave, injury-related compensation did not accrue from year to year, could not be taken at any time, did not affect retirement eligibility, and is not transferable to another district. Accordingly, the court indicated that the supplemental compensation did not conflict with the statute and that the district had the statutory authority to grant this additional benefit at its discretion.

In Tennessee, a teachers' association sought a declaration as to whether their board of education could lawfully limit to five the number of years of prior credit that it would grant to teachers for out-of-county experience. An appellate court upheld the restriction as lawful on the basis that the district had the statutory authority to limit the number of years of experience it accepted in hiring teachers with out-of-county experience.[53] However, the court added that the district erred in determining the salaries of those teachers where the negotiated settlement called for pay to be calculated by adding a local supplement to the minimum statutory salary. The court noted that the board's reliance on the composite salary schedule included in an appendix to the contract shortchanged teachers with experience from other counties because the sum of the statutory minimum and the agreed upon local supplement was greater than what they would have received if placed according to the composite salary schedule.

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[52] Seattle Sch. Dist. No. 1 v. International Union of Operating Eng'rs, 944 P.2d 1062 [121 Educ. L. Rep. 367] (Wash. Ct. App. 1997).

[53] Knox County Educ. Ass'n v. Knox County Bd. of Educ., 953 S.W.2d 686 [121 Educ. L. Rep. 1198] (Tenn. Ct. App. 1997).

Other Issues

A local newspaper filed a freedom of information claim against a school district and teachers union when the parties agreed to close grievance hearings to the public. After the Connecticut Freedom of Information Commission granted the newspaper's request for access to the proceedings under the state's Freedom of Information Act, the teachers' union appealed on the basis that the hearings could be closed based on the statutory exception for strategy or negotiations with respect to collective bargaining. The Supreme Court of Connecticut concluded that since grievance hearings were meetings under the Act, they had to be conducted openly whenever witnesses testify and evidence is collected.[54] At the same time, the court added that negotiations regarding remedies or the settlement of grievances should be closed to the public since they fell under the exclusion clause.

In a case where the Indiana Education Employment Relations Board (IEERB) found that it had jurisdiction over a dispute, a school employee served its members with requests for interrogatories. More specifically, the employee wanted to determine whether board members or their spouses had belonged to a variety of teachers' associations. After a trial court denied the IEERB's motion to quash, it sought further review. An appellate court reversed in favor of the IEERB.[55] The court stated that the employee could not raise the issue of the affiliations of board members during judicial review since she had not done so in her hearing before the IEERB.

A teacher who sustained permanent head injuries when she attempted to intervene in a fight between two middle school students unsuccessfully filed a third party claim against her district. The teacher sued in an effort to determine whether the provisions of her collective bargaining agreement concerning student discipline created a duty on the part of the board and principal not only to inform her about a pupil's violent nature and history but also to take appropriate disciplinary action against the child. An appellate court in Tennessee affirmed a grant of summary judgment in favor of the district.[56] According to the court, contractual language that makes student records available to teachers in order to allow them to make disciplinary recommendations could not be read as requiring the district to disseminate the information to all staff as a matter of routine. Further, the court contended that the contractual provision requiring each teacher to behave as a "reasonable person" when confronted with a student fight did not create a duty to train staff or hire security personnel. The court acknowledged that since principals had discretion in dealing with student discipline, there was no duty to impose a particular sanction against a student.

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[54] Waterbury Teachers Ass'n v. Freedom of Information Comm'n, 694 A.2d 1241 [119 Educ. L. Rep. 512] (Conn. 1997).

[55] Indiana Educ. Employment Relations Bd. v. Tucker, 676 N.E.2d 773 116 Educ. L. Rep. 776] (Ind. Ct. App. 1997).

[56] Warren v. Metro, 955 S.W.2d 618 [122 Educ. L. Rep. 865] (Tenn. Ct. App. 1997).

Conclusion

As this year's cases demonstrate, disputes between schools and the unions of their employees are frequent and varied. Although the number of actions is slightly greater than those reported in the previous two years, it is unlikely this increase signals any sort of trend in management-employee relationships in school settings. The stream of litigation over bargaining in schools and the topics addressed have remained remarkably constant from year to year. This year's cases are no exception as they illustrate the continuing importance of the bargaining relationship, the preference for administrative resolution of disputes, and the healthy deference the judiciary grants the results of those proceedings.

5

STUDENTS WITH DISABILITIES

Allan G. Osborne, Jr.

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Introduction

As has been the situation for many years, litigation over the rights of students with disabilities continued at a significant pace in 1997. In addition, many cases involved procedural matters and contested placement decisions under the Individuals with Disabilities Education Act.[1] A majority of the suits dealt with procedural and dispute resolution issues. As always, many of the actions addressed whether school districts had offered students a free appropriate public education (FAPE). Although the Supreme Court did not decide any disputes on their merits during 1997, it did summarily remand three cases for reconsideration.

Probably the most significant event affecting the law of special education was the passage of the Individuals with Disabilities Education Act Amendments of 1997 (hereafter 1997 IDEA Amendments), which were signed into law by President Clinton in June 1997.[2] Another significant event affecting special education was the Supreme Court's decision in *Agostini v. Felton.*[3] Even though *Agostini* did not involve special education statutes, it will have an effect on the delivery of services to students with disabilities who are attending parochial schools. Consequently, the changes are briefly discussed in the "Entitlement" section below. The reader is referred to the "Pupils" chapter for a more thorough treatment of *Agostini*.

As in past years, suits have been filed on behalf of students with disabilities under section 504 of the Rehabilitation Act[4] and the Americans with Disabilities Act (ADA)[5] as well as the IDEA. Most of these cases alleged that the students were subjected to discriminatory treatment on the basis of their disabilities. Again, as in the past, students with disabilities have gained little under these laws that they were not already entitled to under the IDEA.

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[1] 20 U.S.C. § 1400 *et seq*

[2] P.L. 105-17.

[3] 117 S. Ct. 1997 (1997).

[4] 29 U.S.C. § 794.

Entitlement to Services

The IDEA requires school districts to provide each student with a disability with a FAPE, consisting of any needed special education and related services.[6] Even so, the IDEA does not establish substantive standards by which to judge the adequacy of services. The IDEA requires schools to offer students specially designed instruction[7] in conformance with their Individualized Education Program (IEP).[8] The Supreme Court has held that students with disabilities are entitled to personalized instruction with support services sufficient to permit them to benefit from their educations.[9] The lower courts have been cautioned not to impose their views of preferable educational methods on school districts;[10] however, they are frequently asked to determine what level of services is required to meet the IDEA's minimum standards. Students attending private schools are also entitled to the benefits of the IDEA.[11]

For several years now a small, but significant, number of suits have involved the question of whether a student who voluntarily attends a parochial school is entitled to special education and related services. This issue became more controversial when the private school in question was religiously affiliated in light of the Supreme Court's ban on providing services on-site.[12] However, in 1997 the Court lifted that ban in *Agostini v. Felton*.[13] In *Agostini* the Court ruled that providing Title I services on the premises of a parochial school does not violate the Establishment Clause. Thus, it is reasonable to assume that a district could also offer special education services on-site. The 1997 IDEA Amendments also add that a district may provide such services on-site, but do not explicitly require it to do so.[14] Additionally, the amendments state that the amount of federal funds that a district expends on a child with a disability who is attending a parochial school must be consistent with what is spent on a public school student.[15]

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[5] 42 U.S.C. §§ 12101 - 12213.

[6] 20 U.S.C. § 1401(18).

[7] 20 U.S.C. § 1401(16).

[8] 20 U.S.C. § 1401(18)(d).

[9] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 [5 Educ. L. Rep. [34] (1982).

[10] *Id.*

[11] 34 C.F.R. § 300.452.

[12] Aguilar v. Felton, 473 U.S. 402 [25 Educ. L. Rep. 1022] (1985).

[13] 117 S. Ct. 1997 (1997).

[14] 1997 IDEA Amendments of 1997, § 612(a)(10)(A)(i)(II).

The Supreme Court summarily vacated and remanded three cases (*Russman v. Board of Education of the Enlarged City School District of the City of Watervliet*,[16] *Fowler v. Unified School District*,[17] and *K.R. v. Anderson Community School Corporation*[18]) dealing with this issue for reconsideration by the appellate courts in light of the 1997 IDEA Amendments. In *Russman*, the Second Circuit found that although districts in New York had the discretion to deny on-site services where economies of scale were present, it made little sense to offer services only at a public school if they could be delivered at a private school with no significant additional costs.[19]

In *Fowler*, the Tenth Circuit maintained that students with disabilities in Kansas who had been voluntarily placed in private schools by their parents should participate in IDEA programs but that their level of activity could be different from that of pupils in public schools.[20] Again, the issue of cost appeared to influence the court as it indicated that the level of participation could be determined by the expense of providing the services at the private school. On remand, the court noted that its previous decision stood regarding actions that occurred before June 4, 1997, as the 1997 IDEA Amendments could not be applied retroactively.[21] Regarding decisions that took place after the Amendments went into effect, the court asserted that a district's sole obligation is to spend a proportionate amount of federal funds on parochial school students for special education and related services. At the same time, the court pointed out that the 1997 IDEA Amendments made it clear that states need not spend their own funds to provide special education and related services for students who have been offered a FAPE, but whose parents voluntarily placed them in private schools.

According to the Seventh Circuit's judgment in *Anderson*, a public school in Indiana discharged its duty to provide services to a student in a private school when it made them available at a public school site.[22] On remand from the Supreme Court, the appellate panel observed that the

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[15] 1997 IDEA Amendments of 1997, § 612(a)(10)(A)(i)(I).

[16] 117 S. Ct. 2502 (1997) (mem.).

[17] 117 S. Ct. 2503 (1997) (mem.).

[18] 117 S. Ct. 2505 (1997) (mem.).

[19] 85 F.3d 1050 (2d Cir. 1996).

[20] 107 F.3d 797 [116 Educ. L. Rep. 547] (1997).

[21] 129 F.3d 1431 [122 Educ. L. Rep. 391] (10th Cir. 1997).

[22] 81 F.3d 673 [108 Educ. L. Rep. 533] (7th Cir. 1996).

1997 Amendments unambiguously show that participating states and districts have no obligation to spend their money to ensure that students with disabilities who have voluntarily enrolled in private schools receive publicly-funded special educational services that are comparable to those provided to children in public schools.[23]

In another action along the same lines, the Fifth Circuit reasoned that although students in private schools in Louisiana are entitled to help under the IDEA, they may neither receive a greater share of the benefits nor of the funds necessary to provide them than children in public schools who are similarly situated.[24] In vacating and remanding the trial court's order, the panel stated that a student in a private school must make the initial showing that on-site services are needed. The court added that once a district must provide on-site services, it must continue to do so unless it presents a justifiable reason for their denial. After a rehearing, the court withdrew its decision and instead ruled that the district was not legally obligated to provide an on-site sign language interpreter at the parochial school.[25] The court was persuaded by an amicus curiae brief in which the Department of Education took the position that the IDEA imposed no obligation on the district to provide on-site services as long as a FAPE had been made available to the student. The court was further influenced by Congress' passage of the 1997 IDEA Amendments.

The federal trial court in Minnesota decreed that school districts are not required to provide on-site services to students attending private schools.[26] Similarly, in denying a motion to reconsider an earlier judgment, a federal trial court in Missouri refused to require a school district to provide on-site special education and related services.[27] The court reflected that it would be more costly to provide those services at the parochial school.

If a district chooses to provide special education and related services at a public, rather than at a private, school, the district is not necessarily required to furnish transportation between the two sites according to the Eleventh Circuit.[28] Here the parochial school that a child in Alabama attended was three blocks from the public school where her speech therapy was provided. The court was of the opinion that since the transportation was not necessary for the student to benefit from her special education, it was not required.

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[23] 125 F.3d 1017 [121 Educ. L. Rep. 490] (7th Cir. 1997).

[24] Cefalu v. East Baton Rouge Parish Sch. Bd., 103 F.3d 393 [115 Educ. L. Rep. 252] (5th Cir. 1997), *vacating and remanding* 907 F. Supp. 966 [105 Educ. L. Rep. 979] (M.D. La. 1995).

[25] Cefalu v. East Baton Rouge Parish Sch. Bd., 117 F.3d 231, [119 Educ. L. Rep. 338] (5th Cir. 1997).

[26] Peter v. Johnson, 958 F. Supp. 1383 [117 Educ. L. Rep. 943] (D. Minn. 1997).

[27] Foley v. Special Sch. Dist. of St. Louis County, 968 F. Supp. 481 [119 Educ. L. Rep. 896] (E.D. Mo. 1997).

[28] Donald B. v. Board of Sch. Comm'r of Mobile County, 117 F.3d 1371 [119 Educ. L. Rep. 380] (11th Cir. 1997).

Several suits involved issues of classification and eligibility for special education. A district court in Virginia confirmed a hearing officer's determination that a student who experienced academic, behavioral, and legal problems was ineligible for special education services for the seriously emotionally disturbed.[29] The court relied on several psychological evaluations indicating that the student was not seriously emotionally disturbed along with testimony from his teachers that his academic success or failure depended on his own motivation. Similarly, a federal trial court in Georgia ascertained that a school district which did not classify a child who experienced academic failure as disabled[30] had not misclassified the child. The court agreed with testimony that since the child's poor marks were due to his failure to turn in assignments and not an inability to comprehend or understand classroom material, he was ineligible for special education.

Parents in Indiana contested a school district's classification of a student as emotionally disabled. A federal trial court agreed that the classification was appropriate in light of documented evidence that the child's behavior fit the definition of the emotionally disabled.[31] The court acknowledged that during one school year the student had a two-week psychiatric hospitalization, hit another child in the face without provocation, had a shoving match with another pupil, threw food, knocked over a chair and desk, threw a chair, used inappropriate language, verbally abused school staff, wrote on his arm with a marker, tore his sweatshirt, brought a knife to school, talked about committing suicide, refused to work because he did not bring a book to class, smoked on school grounds, forged his parents' signatures, and complained of being tired and slept in class.

One suit involved the eligibility of incarcerated youth to receive special education services. A state court in Connecticut ruled that a special school district had to deliver special education services to a nineteen-year-old student with learning disabilities who had been detained by the Department of Corrections while awaiting trial.[32] The court contended that the scope of the IDEA extends to cover all students with disabilities including those who are pretrial detainees.

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[29] Springer v. Fairfax County Sch. Bd., 960 F. Supp. 89 [118 Educ. L. Rep. 184] (E.D. Va. 1997).

[30] Clay T. v. Walton County Sch. Dist., 952 F. Supp. 817 (M.D. Ga. 1997).

[31] Roy and Anne M. v. Valparaiso Community Sch., 951 F. Supp. 1370 (N.D. Ind. 1997).

[32] State of Connecticut–Unified Sch. Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077 [120 Educ. L. Rep. 1095] (Conn. Super. Ct. 1977).

Procedural Safeguards

The IDEA contains an elaborate system of due process safeguards to ensure that students with disabilities are properly identified, evaluated, and placed according to the Act's mandates.[33] The regulations promulgated under the Act dictate that the parents or guardians of students with disabilities must be provided with opportunities to participate in the development of IEPs for their children.[34] The IDEA's regulations also require districts to obtain parental consent prior to evaluating children or making initial placements.[35] Once students have been placed in special education, a district must provide the parents or guardians with proper notice before initiating a change in placement.[36] Once placed, the students' situations must be reviewed at least annually and each child must be reevaluated at least every three years.[38]

Under the IDEA, the parents of students with disabilities may be entitled to independent evaluations at the public's expense if they disagree with a school district's evaluation.[39] However, a district may challenge the request for an independent evaluation in an administrative hearing, and if it is agreed that the school district's evaluation was appropriate, the parents are not entitled to have another hearing at the public's expense.[40]

The IDEA stipulates that an IEP must include statements about a student's current educational performance, annual goals and short term objectives, the specific educational services to be provided, the extent to which the child can participate in general education, the date of initiation and duration of services, and evaluation criteria to determine if the objectives are being met.[41]

Evaluation

In a class action suit alleging that Hawaii's methods of testing children violated the IDEA, the Ninth Circuit held that the statute's procedural safeguards applied to noncomprehensive evaluations.[42] Hawaii allowed for two types of evaluations: a comprehensive review when there was a question of whether a student had a disability and a noncomprehensive examination when a child was not suspected of being disabled but may have exhibited achievement delays or adjustment difficulties. A screening committee considered which evaluation to employ when a student was referred by either parents or school officials. The court found that the state could draw distinctions between students based on the perceived nature of their difficulties but must explain the differences in the tests to the parents and inform them how they could challenge a decision to proceed with one type of evaluation rather than the other.

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[33] 20 U.S.C. § 1415.

[34] 34 C.F.R. § 300.345.

[35] 34 C.F.R. § 300.504(b).

[36] 20 U.S.C. § 1415(b)(1)(C).

[37] 34 C.F.R. § 300.343(d).

[38] 34 C.F.R. § 300.534(b).

[39] 20 U.S.C. § 1415(b)(1)(A) and 34 C.F.R. § 300.503.

[40] 34 C.F.R. § 300.503(b).

[41] 20 U.S.C. § 1401(20).

[42] Pasatiempo v. Aizawa, 103 F.3d 796 [115 Educ. L. Rep. 314] (9th Cir. 1996).

An interesting case arose in Michigan when parents refused to permit school officials to evaluate two students who had experienced difficulties. Although state law permitted the district to request a hearing to allow the testing over the parents' objections, school officials did not request one. The parents later filed suit alleging that they had been deprived of their rights to due process and equal protection by the district's failure to request the hearing. A federal trial court, stating that the claim was frivolous, pointed out that the policy allowing the district to request a hearing was permissive, not mandatory.[43]

The federal district court in Kansas judged that a school district's evaluation complied with applicable law since the student, who was hearing impaired, was assessed in areas related to his suspected disability by a multidisciplinary team that possessed the requisite professional skills.[44] The test included assessments of the child's hearing, hearing aids, speech, language, intelligence, and educational achievement.

The Supreme Court of Montana let stand a hearing officer's decision that a school district's failure to conduct a three-year reevaluation did not result in a loss of educational opportunity.[45] The hearing officer also concluded that the student's own conduct was likely to have contributed to the system's inability to conduct the required reevaluation.

Rights of Parents or Guardians

The Seventh Circuit reasoned that the rights of a parent in Wisconsin were not violated when a hearing decision was not rendered in a timely fashion.[46] The court posited that the mother had agreed to extensions and that further delays were caused by the sheer volume of documentation in the case, an amount that the court found the mother contributed to by challenging every perceived substantive and procedural error. Having generated so many issues, the court was of the opinion that it was unreasonable to expect a detailed decision within the time frame established by the regulations.

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[43] Hartfield v. East Grand Rapids Pub. Sch., 960 F. Supp. 1259 [118 Educ. L. Rep. 257] (W.D. Mich. 1997).

[44] Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 959 F. Supp. 1338 [118 Educ. L. Rep. 147] (D. Kan. 1997).

[45] Parini v. Missoula County High Sch. Dist. No. 1, 944 P.2d 199 [121 Educ. L. Rep. 326] (Mont. 1997).

[46] Heather S. by Kathy S. v. Wisconsin, 125 F.3d 1045 [121 Educ. L. Rep. 493] (7th Cir. 1997).

In Arizona, the federal trial court declared that a school district violated the rights of the parent whose child received a long-term suspension because notice of the manifestation meeting was insufficient.[47] The court asserted that the notice did not detail the reasons for the proposed action nor invite the parent to participate in the meeting.

The federal trial court in Puerto Rico maintained that a school district properly notified the parents of an autistic student of their rights under the IDEA in spite of their claims otherwise.[48] The Department of Education had presented the court with a copy of its notice of rights that had been signed by the student's mother. Yet, in the same case, the court offered that the Department did violate the parents' rights by failing to provide them with a timely hearing.

A federal trial court in New York decreed that parents' due process rights had not been violated since the school district convened IEP team meetings and granted their request for an impartial administrative hearing.[49]

Development of Individualized Education Programs

The federal trial court in Kansas was called upon to evaluate the adequacy of proposed IEPs on two occasions. In the first, it observed that a proposed IEP complied with federal and state laws as it contained all of the required elements.[50] The court noted that the IEP had very specific statements of the student's current levels of functioning, annual goals that adequately described the anticipated performance for the next year, specific objectives that were measurable intermediate steps toward the stated goals, and clearly stated evaluation criteria and procedures. In the second, the court offered that the IEP that contained a description of the student's present level of performance, annual goals and short-term objectives, a description of the procedures by which progress would be measured, and a statement of the specific related services that would be provided met the procedural requirements of federal and state laws.[51]

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[47] Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423 [117 Educ. L. Rep. 962] (D. Ariz. 1997).

[48] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997).

[49] Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [122 Educ. L. Rep. 434] (N.D.N.Y. 1997).

[50] Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 959 F. Supp. 1338 [118 Educ. L. Rep. 147] (D. Kan. 1997).

On the other hand, the federal trial court in Vermont ruled that a proposed IEP was inappropriate since it omitted several annual goals and short-term objectives that had been included in previous IEPs and did not even address the student's most profound disability.[52]

Change in Placement

In a number of suits, courts were asked to consider what constituted the pendant placement for purposes of the IDEA's status quo provision. The Seventh Circuit held that a court-ordered setting for a student in a private school in Illinois was the status quo placement.[53] The student had been expelled from his prior school because he posed too much of a threat to other children. Previously, when the district failed to make an appropriate placement, the trial court ordered the child's placement in a private school that could implement his IEP. Similarly, the federal trial court in Maryland acknowledged that the residential placement called for by a hearing officer was the status quo since the hearing officer's order constituted agreement by the state to a change in placement.[54]

Where a district agreed to a private school placement on an interim basis, the federal district court in New Jersey ordered it to continue to fund the program until the basic dispute was settled.[55] The court contended that the school board had not placed any specific limits on the duration of the interim placement.

Parents in Tennessee filed suit against a district that changed the placement of a number of students from one school to another. The court mandated that the "then-current placement" was not the school that the district had proposed for the following year but was the one the students had been attending.[56]

In another interesting case, the mother of a learning disabled student in Florida asked a school district to transfer her son to another high school because he had difficulty adjusting to the environment in his home school. The school granted the mother's request contingent on the child's maintaining good conduct, effort, and attendance. After the student received several disciplinary referrals and was transferred back to the home school, his mother invoked the IDEA's status quo provision. The trial court ascertained that since the student's IEP did not change, his transfer from one school to another did not violate the IDEA.[57]

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[51] O'Toole v. Olathe Dist. Sch. Unified Sch. Dist.No. 223, 963 F. Supp. 1000 [118 Educ. L. Rep. 676] (D. Kan. 1997). *See also* Glazier v. Indep. Sch. Dist. No. 876, 558 N.W.2d 763 [115 Educ. L. Rep. 1046] (Minn. Ct. App. 1997).

[52] Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242 [115 Educ. L. Rep. 787] (D. Vt. 1996).

[53] Board of Educ. of Community High Sch. Dist. No. 218 v. Illinois State Bd. of Educ., 103 F.3d 545 [115 Educ. L. Rep. 287] (7th Cir. 1996).

[54] Board of Educ. of Montgomery County v. Brett Y., 959 F. Supp. 705 [118 Educ. L. Rep. 80] (D. Md. 1997).

[55] Bayonne Bd. of Educ. v. R.S. by K.S., 954 F. Supp. 933 [116 Educ. L. Rep. 927] (D.N.J. 1997).

[56] Cole v. Metropolitan Gov't of Nashville and Davidson County, 954 F. Supp. 1214 [116 Educ. L. Rep. 946] (M.D. Tenn. 1997).

A trial court in New York denied a school district's request for a temporary and permanent stay of the IDEA's stay put provision with respect to a student with a disability.[58] The court decided that since the school district had changed either the student's IEP or placement and there was no administrative challenge to do so, the status quo provision was inoperative.

Where a school district in Indiana filed suit to enforce an administrative order, a trial court in Indiana stated that the status quo provision did not provide a jurisdictional basis to enforce the administrative decision.[59] The hearing officer had reported that the district's proposed IEP was appropriate but the student's mother removed him from public school.

Dispute Resolution

If parents disagree with any of a school district's decisions regarding a proposed IEP or of a FAPE, they may request an impartial due process hearing.[60] Any party not satisfied with the final outcome of the administrative proceedings may appeal to the state or federal courts;[61] however, all administrative remedies must be exhausted before resorting to judicial remedies unless it is futile to do so. While administrative or judicial actions are pending, a district may not change a student's placement without parental consent[62] or a court order.[63]

The IDEA empowers the courts to review the record of administrative proceedings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence standard.[64] At the same time, judges have been cautioned not to substitute their views of proper educational methodology for those of competent school authorities.[65] The IDEA does not contain a statute of limitations for filing a lawsuit; therefore, courts must borrow one from analogous state statutes.

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[57] Hill v. School Bd. for Pinellas County, 954 F. Supp. 251 [116 Educ. L. Rep. 660] (M.D. Fla. 1997).

[58] Bethlehem Cent. Sch. Dist. v. Doe, 961 F. Supp. 31 [118 Educ. L. Rep. 277] (N.D.N.Y. 1997).

[59] Metropolitan Sch. Dist. of Martinsville v. Buskirk, 950 F. Supp. 899 [115 Educ. L. Rep. 920] (S.D. Ind. 1997).

[60] 20 U.S.C. § 1415(b)(2).

[61] 20 U.S.C. § 1415(e)(2).

[62] 20 U.S.C. § 1415(e)(3).

[63] Honig v. Doe, 484 U.S. 305 [43 Educ. L. Rep. 857] (1988).

It is important to note that the IDEA is not the exclusive avenue through which parents may enforce the rights of children with disabilities. The IDEA specifically stipulates than none of its provisions can be interpreted to restrict or limit the rights, procedures, and remedies available under the Constitution, section 504, or other federal statutes protecting the rights of students with disabilities.[66] As such, suits frequently are filed under section 504, the ADA, and section 1983 of the Civil Rights Act of 1871[67] in addition to the IDEA.

Administrative Hearings

As usual, several actions questioned whether parents had to exhaust administrative remedies before seeking judicial intervention. A district court in Illinois granted a school board's motion to dismiss when the court held the fact the parents had asserted constitutional claims did not alter their obligation to exhaust administrative remedies under the IDEA.[68] The court added that since school authorities had informed the parents of their intent to suspend the pupil and responded to their request for a hearing, it would be unreasonable to conclude that exhaustion would be futile. Similarly, the Supreme Court of Montana indicated that parents who could have brought claims under the IDEA were required to exhaust the statute's administrative remedies before filing a civil suit.[69] The court pointed out that the fact the student no longer was enrolled in the school where the alleged discrimination occurred did not excuse the parents' failure to exhaust remedies.[70] In addition, a district court in Alabama found that parents must exhaust administrative remedies even when their claim alleges that the school system failed to comply with a settlement agreement.[71]

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[64] 20 U.S.C. § 1415(e)(2)(C).

[65] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).

[66] 20 U.S.C. § 1415(f).

[67] 42 U.S.C. § 1983.

[68] Bills v. Hommer Consolidated Sch. Dist. No. 33-C, 959 F. Supp. 507 [117 Educ. L. Rep. 1064] (N.D. Ill. 1997).

[69] Shields v. Helena Sch. Dist. No. 1, 943 P.2d 999 [120 Educ. L. Rep. 1194] (Mont. 1997).

[70] *See also* N.B. by D.G. v. Alachua County Sch. Bd., 84 F.3d 1376 (11th Cir. 1996).

[71] W.L.G. v. Houston County Bd. of Educ., 975 F. Supp. 1317 [121 Educ. L. Rep. 660] (M.D. Ala. 1997).

Where a mother sued the state of Maryland even though the state had not been a party to the administrative proceedings, the federal district court dismissed her charges for failure to exhaust administrative remedies.[72] Similarly, a federal trial court in Indiana dismissed a suit filed by parents who alleged that a school district violated the IDEA by failing to identify their son as needing special services. The court maintained that although the parents exhausted remedies concerning his possible expulsion for disciplinary infractions, their suit failed because they did not do so under the IDEA.[73]

The Ninth Circuit held that plaintiffs who filed suit on behalf of all individuals with disabilities under the age of twenty-two who were confined to jail awaiting trial, required to exhaust administrative remedies.[74] Although the plaintiffs had claimed that the state Department of Education in Arizona failed to monitor or provide special education services to this population, the court observed that the alleged violation did not rise to a systemic level for which the administrative process would not provide a remedy.

Courts have not required exhaustion when it was deemed futile or when an hearing officer did not have the authority to grant the relief requested. A district court in Tennessee posited that it would have been futile to require exhaustion when doing so would have caused students to lose their rights under the status quo provision.[75] The federal trial court in Minnesota agreed that exhaustion would have been futile since the hearing officer lacked the authority to alter state regulations where parents sought an order to require the school district to provide services on the premises of a parochial school, a practice that was prohibited by state law.[76] Similarly, a district court in Pennsylvania was of the opinion that exhaustion was unnecessary since the relief sought was unavailable in administrative hearings[77] and the district court in Massachusetts stated that a parent who raised a question of law was not required to exhaust administrative remedies.[78] In addition, the federal district court in Vermont noted that a school system's failure to afford a parent all procedural safeguards was an adequate reason for her not having to exhaust administrative remedies on all issues.[79]

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[72] McGraw v. Board of Educ. of Montgomery County, 952 F. Supp. 248 [116 Educ. L. Rep. 267] (D. Md. 1997).

[73] Brown v. Metropolitan Sch. Dist. of Lawrence Township, 945 F. Supp. 1202 [114 Educ. L. Rep. 861] (S.D. Ind. 1996).

[74] Doe v. Arizona Dep't of Educ. 111 F.3d 678 (9th Cir. 1997).

[75] Cole v. Metropolitan Gov't of Nashville and Davidson County, 954 F. Supp. 1214 [116 Educ. L. Rep. 946] (M.D. Tenn. 1997).

[76] Peter v. Johnson, 958 F. Supp. 1383 [117 Educ. L. Rep. 943] (D. Minn. 1997).

[77] Jeffrey and Mary Y. v. St. Mary's Area Sch. Dist., 967 F. Supp. 852 [119 Educ. L. Rep. 465] (W.D. Pa. 1967).

[78] Doe v. Town of Framingham, 965 F. Supp. 226 [119 Educ. L. Rep. 109] (D. Mass. 1997).

Court Proceedings

The Ninth Circuit affirmed that a hearing officer's adjudication was entitled to substantial weight not only due to its detail and sensitivity but also because his analysis was intensive and comprehensive.[80] The court added that the hearing officer applied the correct standard that asked whether the placement implemented the student's major IEP goals.

A federal trial court in New York ruled that since the burden of proof in administrative hearings is placed on a school district, it should remain there in judicial proceedings.[81] The court reasoned that placing the burden on districts recognizes their obligation to attend to the specific education needs of students.

Several courts were called upon to decide which level in administrative proceedings should be accorded the greatest deference. The Seventh Circuit affirmed that a trial court in Wisconsin had correctly given due weight to a final administrative order rather than the results of the initial hearing.[82]

In a 1995 case that was only recently published, the district court in Minnesota held that greater deference should be given to an initial hearing officer's decision rather than that of a reviewing officer.[83] The court acknowledged that a hearing officer had the opportunity to observe witnesses and make believability determinations. Conversely, a state appellate panel in Minnesota affirmed that greater deference should be given to the reviewing officer's decision as that was the decision being reviewed by the court.[84] Here the decisions at both administrative levels were in agreement and did not depend on witness credibility.

In another suit from Minnesota, the trial court stated that it had the power to grant relief to order a school district to employ a different instructor to provide special education services to a child with a disability.[85]

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[79] Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242 [115 Educ. L. Rep. 787] (D. Vt. 1996).

[80] County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458 (9th Cir. 1996).

[81] Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501 [114 Educ. L. Rep. 834] (E.D.N.Y. 1996).

[82] Heather S. by Kathy S. v. Wisconsin, 125 F.3d 1045 [121 Educ. L. Rep. 493] (7th Cir. 1997).

[83] Independent Sch. Dist. No. 283 v. S.D. by J.D., 948 F. Supp. 860 [115 Educ. L. Rep. 747] (D. Minn. 1995), *aff'd on other grounds* 88 F.3d 556 [110 Educ. L. Rep. 987] (8th Cir. 1996).

[84] Glazier v. Independent Sch. Dist. No. 876, 558 N.W.2d 763 [115 Educ. L. Rep. 1046] (Minn. Ct. App. 1997).

[85] Moubry v. Independent Sch. Dist. No. 696(ELY), 951 F. Supp. 867 [116 Educ. L. Rep. 165] (D. Minn. 1996).

However, the court reflected that such a step would be extraordinary and that a parent would have to show that the child's failure to progress was directly attributable to the challenged instructor and that less intrusive measures would not have rectified the problem. Since such a showing had not been made, the court refused to take this unusual step.

The Third Circuit declared that once a school district and parents in New Jersey finalized a settlement agreement in which the system agreed to pay a portion of the costs of a placement desired by the parents, they should not be allowed to avoid it merely because the program's expense subsequently increased.[86] After the agreement had been reached, the private school where the child had been placed determined that the student required a one-to-one aide along with the services that he received all along. The district, citing the settlement agreement, refused to pay for the aide. The trial court offered that the settlement did not allow the district to avoid its responsibilities under the IDEA. The appeals court reversed on the basis that a party enters into a settlement agreement, in part, to avoid unpredictable costs of litigation in favor of agreeing to known expenses.

The Eleventh Circuit affirmed that a non-attorney parent in Florida could not represent a child in court proceedings brought pursuant to the IDEA.[87] Asserting that the IDEA allows parents to sue on behalf of their children, the court contended that it did not allow them to act as counsel in such a suit. The court concluded that this helps to ensure that children are not deprived of their day in court by unskilled parents.

Standing to Sue

Where a hearing officer agreed with a district that its proposed IEP was appropriate, the parent removed the child from the public schools. Subsequently, a federal trial court in Indiana dismissed the district's attempt to enforce the administrative adjudication on the basis that it lacked standing since it was not harmed by the hearing officer's action.[88] Similarly, a district court in New York decreed that parents who did not receive the results they hoped for in administrative proceedings lacked standing to sue the state because there was no concrete case or controversy.[89]

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[86] D.R. v. East Brunswick Bd. of Educ., 109 F.3d 896 [117 Educ. L. Rep. 51] (3d Cir. 1997), *rev'g* 838 F. Supp. 184 (D.N.J. 1993).

[87] Devine v. Indian River County Sch. Bd., 121 F.3d 576 [120 Educ. L. Rep. 436] (11th Cir. 1997).

[88] Metropolitan Sch. Dist. of Martinsville v. Buskirk, 950 F. Supp. 899 [115 Educ. L. Rep. 920] (S.D. Ind. 1997).

[89] M.M. and D.M. v. Board of Educ. of the Waterville Cent. Sch. Dist., 963 F. Supp. 185 [118 Educ. L. Rep. 647] (N.D.N.Y. 1997).

In the first of two cases from Minnesota, the federal trial court found that a mother who received a generally favorable result through administrative proceedings had standing to sue over aspects of the decision that were unfavorable to her position.[90] According to the court, the mother's complaint could proceed because she was an aggrieved party on those issues.

The parents of two students who attended parochial schools and a nonprofit foundation whose members included parents of children with special needs, religious schools, and religious organizations challenged a school district's refusal to provide on-site services. The federal trial court in Minnesota held that the parents had standing to sue even though the students were no longer enrolled in the sectarian school because their injuries were neither hypothetical nor conjectural.[91] The court added that the foundation lacked standing because it did not sufficiently allege that its members would otherwise have had the ability to sue in their own right.

In a lawsuit where the parents named the state education department as a defendant because of a reviewing officer's decision, a federal trial court in New York agreed that it was a proper party to the action.[92] The court maintained that since the reviewing officer acted on behalf of the state, it was responsible for and subject to liability for his decision.

Statute of Limitations

Over the past several years courts in many states have indicated that the statute of limitations for recovery of attorney fees by prevailing parents is different insofar as it is generally longer than one for an action contesting a placement recommendation. A case from the Eleventh Circuit continued this trend in 1997. The court acknowledged that since an action for attorney fees was based on a statutory liability, it was analogous to Florida's four-year limitations period for such cases.[93] The court added that this was not inconsistent with the IDEA's policies as an application for attorney fees was less urgent than a placement decision and, in reality, was more likely to be resolved by the lawyer's interest in prompt payment. Moreover, a federal trial court in New York judged that there was no similarity between an action for attorney fees and one to appeal a final administrative decision since speed was not of the essence in the former.[94] The court posited that a petition for attorney fees was governed by the three-year statute of limitations which applied to actions seeking to recover upon a liability created or imposed by statute. At the same time, the federal district court in Vermont indicated that the state's six-year-catch-all statute of limitations was most appropriate for an attorney fees action. As such, the court decreed that a short limitations period would frustrate the IDEA's policy of protecting the rights of children with disabilities.[95]

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[90] Moubry v. Independent Sch. Dist. No. 696 (ELY), 951 F. Supp. 867 [116 Educ. L. Rep. 165] (D. Minn. 1996).

[91] Peter v. Johnson, 958 F. Supp. 1383 [117 Educ. L. Rep. 943] (D. Minn. 1997).

[92] Mr. X. v. New York State Educ. Dep't, 975 F. Supp. 546 [121 Educ. L. Rep. 598] (S.D.N.Y. 1997).

[93] Zipperer v. School Bd. of Seminole County, 111 F.3d 847 [117 Educ. L. Rep. 494] (11th Cir. 1997), *vacating and remanding* 891 F. Supp. 583 [102 Educ. L. Rep. 175] (M.D. Fla. 1995).

A federal district court in New York observed that the parents' three-year delay in requesting tuition reimbursement barred their claims for the first two years due to laches.[96] The court was of the opinion that since the parents received sufficient notice of their right to a due process hearing, their delay in requesting one prejudiced the district's position because school officials did not have the opportunity to make changes in their recommended program that might have obviated the need for a private placement.

In an action for compensatory education, a district court in West Virginia held that a claim that accrued in 1986 when the student was not given special education services was time-barred since her mother was well aware of that denial.[97] The court pointed out that the state's two-year statute of limitations governing personal actions other than those for property damage and personal injuries was most analogous to a request for an administrative hearing seeking compensatory education for a denial of an appropriate education. However, a district court in Pennsylvania ascertained that a damages suit for alleged violations of the IDEA was not time-barred as the charges constituted a continuing violation.[98]

Actions Under Other Statutes

The Eighth Circuit affirmed that since general and punitive damages are unvailable under the IDEA, parents in Minnesota could not pursue claims under section 1983.[99] The court reasoned that since the parents failed to state a claim under the IDEA, their section 1983 claim was without merit. Similarly, a district court in Virginia noted that in order to state a claim for compensatory and punitive damages under section 1983, a plaintiff must bring such a claim under the IDEA.[100]

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[94] Shanahan v. Board of Educ. of the Jamesville Dewitt Sch. Dist., 953 F. Supp. 440 [116 Educ. L. Rep. 614] (N.D.N.Y. 1997).

[95] J.B. by C.B. v. Essex-Caledonia Supervisory Union, 943 F. Supp. 387 [114 Educ. L. Rep. 487] (D. Vt. 1996).

[96] Phillips v. Board of Educ. of the Hendrick Hudson Sch. Dist., 949 F. Supp. 1108 [115 Educ. L. Rep. 838] (S.D.N.Y. 1997).

[97] Leake v. Berkeley Count Bd. 1of Educ., 965 F. Supp. 838 [119 Educ. L. Rep. 130] (N.D.W.Va. 1997).

[98] Jeffrey and Mary Y. v. St. Mary's Area Sch. Dist., 967 F. Supp. 852 [119 Educ. L. Rep. 465] (W.D. Pa. 1997).

[99] Hoekstra v. Independent Sch. Dist. No. 283, St. Louis Park, 103 F.3d 624 [115 Educ. L. Rep. 293] (8th Cir. 1996), *aff'g* 916 F. Supp. 941 [107 Educ. L. Rep. [779] (D. Minn. 1996).

The federal trial court for the District of Columbia ruled that a suit could be filed under section 1983 to vindicate rights created by the IDEA.[101] However, the court made it clear that the burden was on the plaintiff to establish that a school system had a custom or practice that was the moving force behind the alleged IDEA violation.

According to a 1995 case from the federal district court in Minnesota that was not published until 1997, a viable claim cannot exist under section 504 or the ADA in the absence of one that is factually and legally distinct from those that have already been resolved under the IDEA.[102] In a separate action, the same court determined that a parent who has exhausted administrative remedies under the IDEA is not required to pursue further relief to maintain a claim of a denial of a FAPE under another federal statute such as section 504 or the ADA.[103] Further, a federal trial court in Alabama declared that parents must exhaust administrative remedies under the IDEA before bringing suit under section 504 or section 1983 if their claims under those statutes are indistinguishable from the IDEA claims.[104]

Placement

The IDEA regulations require school districts to insure the existence of a "continuum of alternative placements" to meet the needs of students with disabilities for special education and related services.[105] The continuum must range from placement in general education to private residential facilities to homebound services. However, the placement chosen for any given student must be in the least restrictive environment (LRE) and removal from general education can occur only to the extent necessary to provide special education and related services.[106] All placements must be made at public expense and must meet state educational standards.[107] Each placement must be reviewed at least annually and revised if necessary.[108] The Supreme Court has held that an appropriate education must not only be developed in compliance with the IDEA's procedures but must also be reasonably calculated to enable a child to receive educational benefits.[109] Although states must adopt policies and procedures that are consistent with the IDEA, they may provide greater benefits than those required by federal law. If a state does establish higher standards, courts will consider those criteria when evaluating the appropriateness of an IEP.[110]

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[100] Sellers v. School Bd. of the City of Manassas, 960 F. Supp. 1006 [118 Educ. L. Rep. 215] (E.D. Va. 1997).

[101] Walker v. District of Columbia, 969 F. Supp. 794 [120 Educ. L. Rep. 447] (D.D.C. 1997).

[102] Independent Sch. Dist. No. 283 v. S.D. by J.D., 948 F. Supp. 860 [115 Educ. L. Rep. 747] (D. Minn. 1995), *aff'd on other grounds* 88 F.3d 556 [110 Educ. L. Rep. [987] (8th Cir. 1996).

[103] Moubry v. Independent Sch. Dist. No. 696(ELY), 951 F. Supp. 867 [116 Educ. L. Rep. 165] (D. Minn. 1996).

[104] W.L.G. v. Houston County Bd. of Educ., 975 F. Supp. 1317 [121 Educ. L. Rep. 660] (M.D. Ala. 1997).

[105] 34 C.F.R. § 300.551.

[106] 34 C.F.R. § 300.550.

[107] 20 U.S.C. § 1401(18).

Appropriate Educational Placement

In a dispute that centered, in part, on the proper classification of a student in Wisconsin, the Seventh Circuit asserted that she would receive an appropriate education in a class for children with cognitive disabilities.[111] Even though the court concluded that the student was not classified as cognitively disabled, it noted that the small class size, increased adult supervision, and curriculum of the class for the cognitively disabled would maximize the response to her complex needs.

The Eighth Circuit affirmed that a proposed IEP for a student in Missouri was appropriate as it would have provided him with educational benefit.[112] The court found that the student's record under previous, similar, IEPs indicated that he had made progress and that, despite his learning disabilities, he had received passing grades. Further, the child's overall reading skills had improved and he had been promoted to the next grade. Similarly, the Fifth Circuit upheld an IEP for a student in Texas since it was similar to an earlier plan that produced positive benefits.[113]

Where a parent of a student with attention deficit disorder discontinued the child's medication, the Eighth Circuit affirmed the federal district court in Minnesota's refusal to overlook the abandonment of a course of prescribed medical care for an impairment which can adversely affect her ability to learn.[114] In approving the district's proposed IEP, the court reasoned that the IDEA did not require a school to cure the disabilities that impair a student's ability to learn but only that it undertake a program of remediation that would allow a child to learn despite her disabilities.

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[108] 34 C.F.R. § 300.552(a)(1).

[109] Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 [5 Educ. L. Rep. 34] (1982).

[110] *See e.g.*, David D. v. Dartmouth Sch. Comm., 775 F.2d 411 [28 Educ. L. Rep. 70] (1st Cir. 1985); Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County, 774 F.2d 575 [27 Educ. L. Rep. 1093] (3d Cir. 1985).

[111] Heather S. by Kathy S. v. Wisconsin, 125 F.3d 1045 [121 Educ. L. Rep. 493] (7th Cir. 1997).

[112] Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607 [120 Educ. L. Rep. [112] (8th Cir. 1997).

[113] Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 [119 Educ. L. Rep. 803] (5th Cir. 1997), *aff'g* 931 F. Supp. 474 (S.D. Tex. 1995).

[114] Independent Sch. Dist. No. 283 v. S.D. by J.D., 948 F. Supp. 860 [115 Educ. L. Rep. 747] (D. Minn. 1995), *aff'd* 88 F.3d 556 [110 Educ. L. Rep. 987] (8th Cir. 1996).

In another situation involving parental impedance, the district court in Maryland determined that any delays in the preparation and implementation of an IEP were caused by the student's mother who walked out of several meetings and repeatedly refused to sign IEPs until further meetings took place.[115] In spite of the mother's allegations, the court found that the IEPs had been implemented.

The Ninth Circuit, in a case from California, affirmed that educational benefit is not limited to academic needs but includes social and emotional needs that affect academic progress, school behavior, and socialization.[116] In addition, the court offered that an IEP defines what goals are relevant in providing the measure of whether a student is getting an educational benefit in the placement. According to the court, the correct standard is not merely whether a placement is reasonably calculated to provide a child with educational benefits, but, rather, whether the student makes progress toward the goals set forth in her IEP.

A district court in New York decreed that a proposed placement was appropriate where evidence showed that the student would be grouped with other children who had similar needs and abilities, that his IEP was producing educational benefits, and that he was making progress in several areas.[117] The court stated that the student's having had altercations with another child in his class did not render the placement inappropriate and that it was beyond the scope of the IDEA to accommodate a parent's ideal educational program.

Relying on the persuasive testimony of two independent medical examiners and a student's own physician that the severity of his physical and mental condition prevented him from benefitting from any special education, a district court in New York declared that an IEP calling for special education, speech and language therapy, physical therapy, and occupational therapy for a traumatic brain injured youngster was sufficient.[118] The student's father had sought increased services but the court disagreed since he failed to produce any evidence that the child would have benefitted from increased services.

In a third case from New York, a district court contended that an IEP calling for a placement in a private nursery school with twenty-five hours per week of Applied Behavioral Analysis was not appropriate for an student who is autistic.[119] The court was persuaded by evaluations indicating that the student required forty hours per week of the Applied Behavioral Analysis. Further, the court doubted whether the private nursery school was even capable of providing the twenty-five hours called for in the proposed IEP.

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[115] McGraw v. Board of Educ. of Montgomery County, 952 F. Supp. 248 [116 Educ. L. Rep. 267] (D. Md. 1997).

[116] County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458 (9th Cir. 1996).

[117] Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501 [114 Educ. L. Rep. 834] (E.D.N.Y. 1996).

[118] Wenger v. Canastota Cent. Sch. Dist., 961 F. Supp. 416 [118 Educ. L. Rep. 288] (N.D.N.Y. 1997).

The federal trial court in Kansas twice decided that parents do not have the right to compel a school district to provide a specific program or employ a specific methodology for the education of a child with a disability. In the first instance the court ascertained that a proposed IEP, calling for a total communications method for instructing a hearing impaired child, was reasonably calculated to afford educational benefits.[120] Calling the total communications method an accepted, proven methodology, the court refused to acquiesce to the parents' wishes for a placement that emphasized an oral method. In the second suit the court also decided that the IDEA does not require a district to use one proven method over another and that the fact that a student did not make the desired progress on some of her objectives did not mean that the system violated the IDEA.[121] The court added that Kansas state law does not require a higher standard than the one established by federal law.

In Maine, the federal district court affirmed a hearing officer's order to place a student in a different school than the home school because his parents' hostility toward the home school prevented him from receiving an appropriate education.[122] The court observed that the student had developed a fear of his home school that would have prevented him from receiving any educational benefit even if his IEP had been implemented there. However, a federal court in Indiana ruled that a child did not require another placement because there was no evidence substantiating the parents' claims that they were hostile toward a school district's proposed placement.[123]

The federal district court in Puerto Rico posited that the worsening of a student's behavior was insufficient by itself to establish that he did not receive a FAPE.[124] The court asserted that a number of factors could have caused the child's behavior to worsen.

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[119] Mr. X. v. New York State Educ. Dep't, 975 F. Supp. 546 [121 Educ. L. Rep. 598] (S.D.N.Y. 1997).

[120] Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 959 F. Supp. 1338 [118 Educ. L. Rep. 147] (D. Kan. 1997). *See also* Glazier v. Independent Sch. Dist. No. 876, 558 N.W.2d 763 [115 Educ. L. Rep. 1046] (Minn. Ct. App. 1997).

[121] *See also* O'Toole v. Olathe Dist. Sch. Unified Sch. Dist., 963 F. Supp. 1000 [118 Educ. L. Rep. 676] (D. Kan. 1997).

[122] Greenbush Sch. Comm. v. Mr. and Mrs. K., 949 F. Supp. 934 [115 Educ. L. Rep. 828] (D. Me. 1996).

[123] Roy and Anne M. v. Valparaiso Community Sch., 951 F. Supp. 1370 (N.D. Ind. 1997).

[124] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997).

Where procedural errors at the heart of lawsuits were minimal, the courts generally entered judgments in favor of school districts. The Supreme Court of Montana affirmed that a district's failure to conduct a required three-year evaluation did not render a student's program inappropriate.[125] The court held that the district made numerous good faith efforts to develop an IEP for the student but that his own behavior caused or contributed to the failure to conduct the reevaluation. The court added that the student still received educational benefit.

A state appellate court in Minnesota approved a school district's proposed IEP in stating that any violations in the process of developing the IEP were technical and did not harm the student's progress or the parent's right to participate in the process.[126] Another federal trial court in the same state reflected that although there were some inconsequential defects in a student's IEP, it was acceptable because school officials properly assured that the parents were active participants in its development.[127]

On the other hand, the courts do not tolerate egregious procedural violations. The federal trial court in Vermont ascertained that a district failed to offer an appropriate education where school personnel committed a number of procedural violations including failing to conduct a supplemental evaluation as required by state law; to provide adequate notice of its refusal to consider a parent's request for a residential placement; and, to develop an IEP after the parent unilaterally enrolled the student in a residential facility.[128] Similarly, the federal trial court in Puerto Rico decided that the Department of Education's failure to conduct a timely hearing was so serious a procedural violation that it did not provide a FAPE.[129]

Whether a court should evaluate the appropriateness of an IEP prospectively or retrospectively is an unsettled issue. A district court in Minnesota indicated that since the role of the judiciary is to evaluate the appropriateness of an IEP at the time it was proposed, the actions of school officials cannot be judged in hindsight.[130] However, the Ninth

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[125] Parrin v. Missoula County High Sch. Dist. No. 1, 944 P.2d 199 [121 Educ. L. Rep. 326] (Mont. 1997).

[126] Glazier v. Independent Sch. Dist. No. 876, 558 N.W.2d 763 [115 Educ. L. Rep. 1046] (Minn. Ct. App. 1997).

[127] Independent Sch. Dist. No. 283 v. S.D. by J.D., 948 F. Supp. 860 [115 Educ. L. Rep. 747] (D. Minn. 1995), *aff'd* 88 F.3d 556 [110 Educ. L. Rep. 987] (8th Cir. 1996).

[128] Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242 [115 Educ. L. Rep. 787] (D. Vt. 1996).

[129] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997).

[130] Independent Sch. Dist. No. 283 v. S.D. by J.D., 948 F. Supp. 860 [115 Educ. L. Rep. 747] (D. Minn. 1995), *aff'd on other grounds* 88 F.3d 556 [110 Educ. L. Rep. [987] (8th Cir. 1996).

Circuit was of the opinion that since a previous IEP had failed, a similar proposed IEP also was unlikely to result in an educational benefit.[131]

Least Restrictive Environment

The Fourth Circuit found that a regular classroom was not the least restrictive environment for an autistic student in Virginia who was unable to speak and suffered severe problems with fine motor coordination.[132] The court maintained that any perceived improvement in the student's social skills could not outweigh his failure to progress academically in the regular classroom. Finding that the student would require significant instruction outside of the classroom to progress, the court stated that the IDEA encourages mainstreaming only to the extent that it does not prevent a child from receiving an educational benefit.

The Seventh Circuit affirmed that a private school in Illinois was not the least restrictive environment for a student with attention deficit hyperactivity disorder.[133] The district court declared that private school or segregated placements are reserved for exceptional instances and that the student did not fall within those exceptions.

A federal trial court in Pennsylvania followed precedent in mandating that a district was not required to place a student with Down's Syndrome in his neighborhood school.[134] The student had been placed in a special education class in a neighboring district because his home system did not operate a similar program. In determining that the out-of-district placement was not more restrictive and offered the same mainstreaming opportunities, the court reflected that the IDEA allows such placements if required by the student's IEP. Similarly, the federal district court in Rhode Island upheld an IEP that called for placement of a student who had a medical condition that required the assistance of a full-time nurse in a school located several miles from his home.[135] The court decreed that the lack of a full-time nurse in the student's home school overrode the IDEA's preference for placement there. In addition, the court refused to second guess the school officials over where nurses should be assigned.

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[131] County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458 (9th Cir. 1996).

[132] Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 [120 Educ. L. Rep. [61]] (4th Cir. 1997).

[133] Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895 [114 Educ. L. Rep. 1042] (7th Cir. 1996), *aff'g* Monticello Sch. Dist. v. Illinois State Bd. of Educ., 910 F. Supp. 446 [106 Educ. L. Rep. 555] (C.D. Ill. 1995).

[134] Cheltenham Sch. Dist. v. Joel P. by Suzanne P., 949 F. Supp. 346 [115 Educ. L. Rep. 804] (E.D. Pa. 1996).

[135] Kevin G. by Jo-Ann G. v. Cranston Sch. Comm., 965 F. Supp. 261 [119 Educ. L. Rep. 114] (D.R.I. 1997), *aff'd* 130 F.3d 481 [122 Educ. L. Rep. 601] (1st Cir. 1997).

In Pennsylvania, a federal trial court approved a school district's proposal to move a student with a learning disability to a more inclusive setting in light of evidence that the student had improved roughly one grade level per year and had received excellent marks.[136] Further, the court contended that suggestions made by the parents' witnesses could be implemented in the less restrictive setting and that the student's self-esteem and social skills would improve in an inclusive environment.

Private Facilities

In California, the Ninth Circuit supported a parent's request for the residential placement of a student who was seriously emotionally disturbed. The court agreed that this would have provided the structure, discipline, and support the child needed to achieve her IEP and mental health goals.[137] Although many of the student's behavioral problems were manifested at home, the court reasoned that her difficulties clearly included substantial educational problems that were related to the noneducational difficulties so that the primary purpose of the residential placement was schooling. The court also judged that the student failed to meet her IEP goals in her prior day treatment program. Similarly, the Second Circuit upheld an order for a residential placement in ascertaining that a student in Connecticut failed to meet nearly all of her IEP objectives in a public school.[138] According to the court, even though a residential setting was needed to alter the child's behavior both at home and school, this did not relieve the district of its responsibility to fund that placement. The court concluded that as long as the pupil's emotional problems prevented her from making meaningful educational progress, the district had to pay for the residential setting.

On the other hand, the Ninth Circuit affirmed without an opinion an unpublished decision of the district court in Oregon that a student was not entitled to a residential placement because a public school setting met her educational needs.[139] The court was persuaded by the fact that the residential placement was necessitated by psychological and emotional difficulties at the child's home. Similarly, the district court in New Jersey mandated that a residential placement was unnecessary for a student with neurological impairments because her parents' complaints were primarily concerned with her behavior at home.[140]

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[136] Jonathan G. v. Lower Merion Sch. Dist., 955 F. Supp. 413 [116 Educ. L. Rep. 1000] (E.D. Pa. 1997).

[137] County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458 (9th Cir. 1996).

[138] Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 [115 Educ. L. Rep. 324] (2d Cir. 1997).

[139] Gladstone Sch. Dist. v. A.M., 105 F.3d 664 (9th Cir. 1996) (mem.).

[140] Schreiber v. Ridgewood Bd. of Educ., 952 F. Supp. 205 [116 Educ. L. Rep. 259] (D.N.J. 1997).

The Seventh Circuit upheld a ruling that a private school placement was unnecessary as it was not the least restrictive environment for a student in Illinois with attention deficit hyperactivity disorder.[141] The trial court had posited that the student's situation did not fit into the narrow exceptions to the IDEA's mainstreaming preference.

In Minnesota, the Eighth Circuit affirmed that a parent's request for a private school placement was not appropriate since the private school's program was substantially similar to the proposed public school program.[142] The court added that the public school teachers were better trained and more experienced than the staff in the private school.

Related Services

The IDEA requires school districts to provide related, or supportive, services to students with disabilities if such help is necessary to assist students in benefitting from their special education programs.[143] The IDEA specifically mentions such developmental, supportive, and corrective services as transportation, speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation and social work services), counseling services (including rehabilitation counseling), medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.[144] The Supreme Court has held that related services need be provided only to students receiving special education and that only those services necessary for them to benefit from special education must be incorporated into their IEPs.[145] The only limitation placed on what can be considered a related service is that medical care is exempted unless it is specifically for diagnostic or evaluative purposes.

While medical care is not a required related service unless it is for diagnostic or evaluative purposes, school health services are considered related services. For some time now it has been controversial as to whether health-related services that fall in between, such as a full-time attendant nurse, qualify as exempted medical services or required related services. In such a case, the Eighth Circuit affirmed that a quadriplegic student in Iowa who needed a personal attendant within hearing distance to see to his health care needs was entitled to one under the IDEA's related services provision.[146] The court agreed that since the services were provided by a nurse, rather than a physician, they qualified as school health, or supportive, services. Similarly, a trial court in Illinois ordered a school district to provide the service of suctioning a student's tracheostomy tube during transportation,[147] pointing out that this procedure could be performed by a properly trained aide who did not have to be a nurse.

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[141] Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895 [114 Educ. L. Rep. 1042] (7th Cir. 1996), *aff'g* Monticello Sch. Dist. No. 25 v. Illinois State Bd. of Educ., 910 F. Supp. 446 [106 Educ. L. Rep. 555] (C.D. Ill. 1995).

[142] Independent Sch. Dist. No. 283 v. S.D. by J.D., 88 F.3d 556 [110 Educ. L. Rep. 987] (8th Cir. 1996), *aff'g* 948 F. Supp. 860 [115 Educ. L. Rep. 747] (D. Minn. 1995).

[143] 20 U.S.C. § 1401(a)(17).

[144] *Id.*

[145] Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 [18 Educ. L. Rep. 138] (1984).

In an interesting case from Minnesota, the federal trial court found that a school system was not required to have an occupational therapist provide occupational therapy or a physical therapist deliver physical therapy.[148] The court stated that the child's parent failed to establish as a matter of law that occupational therapy could only be provided by an occupational therapist. The court also offered that the mother was unable to demonstrate the need for a physical therapist to provide physical therapy.

The Eleventh Circuit affirmed that a student in Mississippi who attended a parochial school but received speech therapy at a public school was not entitled to transportation between the two sites.[149] The court observed that the student's impairment did not require her to need transportation in order to benefit from special education.

In another case involving transportation, a state court in Pennsylvania asserted that a student whose parents were divorced but had joint custody was not entitled to transportation between school and his father's home on the weeks he stayed with his father.[150] The student lived with each parent on alternating weeks but attended the school district in which his mother resided. The court adjudicated that transportation to his father's home was unnecessary since rather than address any of the student's special needs, it served only to accommodate the parents' particular domestic situation.

Discipline

Prior to the enactment of the 1997 IDEA Amendments, there were no provisions in the law specifically referring to discipline. Even so, disciplinary sanctions as applied to students with disabilities were litigated frequently. In the past, courts noted that the IDEA's change in placement and status quo provisions applied to the disciplinary process. In *Honig v. Doe*,[151] the Supreme Court ruled that students in special education cannot be expelled for disciplinary reasons where their misconduct is a manifestation of their disabilities. However, *Honig* did not leave school districts without recourse. Special education students may be temporarily suspended and are subject to other normal disciplinary sanctions. If necessary, a district may seek judicial intervention pending completion of administrative due process hearings where educators believe that a student is dangerous and they cannot reach an agreement with the child's parents concerning a proper placement. The Supreme Court has also allowed districts to use normal disciplinary sanctions, such as suspensions of ten days or less, that do not result in a change in placement for students in special education. The 1997 IDEA Amendments codified many of these rulings and added additional provisions.[152]

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[146] Cedar Rapids Community Sch. Dist. v. Garret F., 106 F.3d 822 [116 Educ. L. Rep. 78] (8th Cir. 1997).

[147] Skelly v. Brookfield LaGrange Park Sch. Dist. 95, 968 F. Supp. 385 [119 Educ. L. Rep. 884] (N.D. Ill. 1997).

[148] Moubry v. Independent Sch. Dist. No. 696 (ELY), 951 F. Supp. 867 [116 Educ. L. Rep. 165] (D. Minn. 1996).

[149] Donald B. v. Board of Sch. Comm'r of Mobile County, 117 F.3d 1371 [119 Educ. L. Rep. 380] (11th Cir. 1997).

[150] North Allegheny Sch. Dist. v. Gregory P., 687 A.2d 37 [115 Educ. L. Rep. 36] (Pa. Commw. Ct. 1996).

For the past few years, courts have been split regarding the question of whether special education students who have been expelled consistent with the IDEA's procedures are entitled to receive educational services. Two recent cases illustrate this controversy. Following a rehearing *en banc*, the Fourth Circuit reversed a three-judge panel that had required a school district in Virginia to provide services during an expulsion.[153] The opinion observed that since a student whose misconduct was unrelated to his or her disabilities forfeited the right to a FAPE, a district was not required to provide alternative educational services during the expulsion. On the other hand, the federal trial court in Arizona decreed that the IDEA requires districts to provide an appropriate education to all students with disabilities, including those who are discipline problems.[154] The court was of the opinion that the word all as used in the statute was clear and unequivocal.

This issue was settled by the enactment of the 1997 IDEA Amendments.[155] Section 612(a)(1)(A) of the amendments makes it clear that special education services must continue during an expulsion. This provision is in line with the position previously taken by the United States

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[151] 484 U.S. 305 [43 Educ. L. Rep. 857] (1988).

[152] IDEA 1997 §§ 612(a)(1), 615(k).

[153] Commonwealth of Virginia Dep't of Educ. v. Riley, 106 F.3d 559 [116 Educ. L. Rep. 40] (4th Cir. 1997), *rev'g* 86 F.3d 1337 [110 Educ. L. Rep. 552] (4th Cir. 1996).

[154] Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423 [117 Educ. L. Rep. 962] (D. Ariz. 1997).

[155] IDEA 1997, § 612(a)(1)(A).

Department of Education[156] and effectively reverses the Fourth Circuit's judgment to the contrary. In a ruling that was issued shortly after the 1997 IDEA Amendments were signed into law, the Seventh Circuit reasoned that a school district was not required to provide a student with educational services during an expulsion.[157] The court, in an addendum, contended that since there was no retroactivity clause in the 1997 IDEA Amendments, they could not be applied to the case at bar.[158]

In Florida, a school district obtained an injunction permitting it to transfer an autistic student who committed forty-three acts of aggression including hitting, spitting, kicking, pulling hair, throwing objects, and sexual touching, to a special education center for forty-five days while an administrative hearing to settle a placement dispute was pending. The federal trial court was swayed by expert testimony that the student would present a significant risk of harm to others if he were allowed to remain in his then-current program.[159]

A state appellate court in Wisconsin asserted that the juvenile court's invocation of its jurisdiction did not frustrate the IDEA or its stay put provision.[160] The court concluded that the IDEA is targeted at school action, not the state's statutory authority to file a delinquency petition even where the alleged behavior occurred at a school.

Remedies

If a school district fails to provide a FAPE for a student with disabilities, the courts are empowered to grant such relief as they determine appropriate.[161] Relief often involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for their children. The Supreme Court has reasoned that school districts may be required to reimburse parents for costs incurred in providing their children with special education and related services if they prevail in having their chosen placements deemed appropriate.[162] Reimbursement is allowed even if the facility chosen by the parents is not state approved as long as it offers an otherwise appropriate education.[163] Compensatory education services have been awarded where parents lacked the financial means to obtain private services while litigation was pending.

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[156] Hartman Letter, 23 IDELR 894 (OSEP 1995).

[157] Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200, 115 F.3d 1273 [118 Educ. L. Rep. 881] (7th Cir. 1997).

[158] 115 F.3d at 1283 [118 Educ. L. Rep. at 891] (7th Cir. 1997).

[159] School Bd. of Pinellas County v. J.M. by L.M., 957 F. Supp. 1252 [117 Educ. L. Rep. 547] (M.D. Fla. 1997).

[160] *In re* Trent N., 569 N.W.2d 719 [121 Educ. L. Rep. 1137] (Wis. Ct. App. 1997).

[161] 20 U.S.C. § 1415(e)(2).

[162] Burlington Sch. Comm. v. Department of Educ., Commonwealth of Mass., 471 U.S. 359 [23 Educ. L. Rep. 1189] (1985).

[163] Florence County Sch. Dist. Four v. Carter, 114 S. Ct. 361 [86 Educ. L. Rep. 41] (1993).

In 1986, Congress passed the Handicapped Children's Protection Act to allow parents who prevail in a lawsuit pursuant to the IDEA to recover their legal expenses.[164] In 1990, Congress passed legislation specifically to abrogate states' Eleventh Amendment immunity to suits in the federal courts for actions arising after October 30, 1990.[165] These amendments were passed in response to Supreme Court cases interpreting the original IDEA as not allowing for the recovery of attorney fees by prevailing parents[166] and not specifically abrogating sovereign immunity.[167]

Damages

A district court in Virginia denied a damages award sought on behalf of an eighteen-year old student with a learning disability whose condition had only recently been discovered.[168] Stating that it is well settled that damages are unavailable under the IDEA, the court maintained that the statute does not create a private cause of action for educational malpractice. Similarly, the federal trial court in the District of Columbia asserted that damages beyond reimbursement are not available under the IDEA.[169]

Tuition Reimbursement

In finding that a private residential school was the appropriate placement for a learning disabled and emotionally disturbed student in Connecticut, the Second Circuit ordered that the student's parents be reimbursed for their out-of-pocket expenses.[170] A trial court in Tennessee also awarded reimbursement to parents for the costs of keeping their children in the private schools they had attended after acknowledging that the district violated the IDEA's status quo provision by attempting to change their placements.[171]

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[164] 20 U.S.C. § 1414(e)(4)(B) et seq.

[165] 20 U.S.C. § 1403.

[166] Smith v. Robinson, 468 U.S. 992 [18 Educ. L. Rep. 148] (1984).

[167] Dellmuth v. Muth, 491 U.S. 223 [53 Educ. L. Rep. 792] (1989).

[168] Sellers v. School Bd. of the City of Manassas, 960 F. Supp. 1006 [118 Educ. L. Rep. 215] (E.D. Va. 1997). *See also* Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607 [120 Educ. L. Rep. 112] (8th Cir. 1997).

[169] Walker v. District of Columbia, 969 F. Supp. 794 [120 Educ. L. Rep. 447] (D.D.C. 1997). *See also* Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [122 Educ. L. Rep. 434] (N.D.N.Y. 1997).

[170] Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 [115 Educ. L. Rep. 324] (2d Cir. 1997).

[171] Cole v. Metropolitan Gov't of Nashville and Davidson County, 954 F. Supp. 1214 [116 Educ. L. Rep. 946] (M.D. Tenn. 1997).

The federal district court in Vermont permitted reimbursement under the Supreme Court's *Carter* rationale for parents who placed their daughter in an unapproved residential facility.[172] Although the school did not have the state's blessing, the court posited that the facility provided a FAPE for the student. The Second Circuit also relied on *Carter* in affirming tuition reimbursement for the parents of a pre-school toddler in New York who had privately obtained services from trained, but not certified, teachers.[173]

In a case from Illinois, the Seventh Circuit affirmed an award of tuition reimbursement for a portion of the time that a student attended a private school.[174] A hearing officer and reviewing officer had agreed that the district's IEP was flawed and that it subsequently developed an appropriate IEP. Thus, the court granted the parents' request for reimbursement only for the period of time before the district developed the IEP that incorporated the hearing officer's order.

The federal trial court in Puerto Rico granted partial reimbursement to parents because even though the Department of Education offered a FAPE for their son, its failure to provide a timely hearing rendered the IEP inappropriate.[175] The court permitted reimbursement for the time period following the date by which a hearing officer should have issued an opinion.

Courts summarily denied tuition reimbursement in several cases. In some suits the courts refused to authorize reimbursement after they determined that school districts proposed and had the capacity to implement appropriate IEPs.[176] A federal trial court in Pennsylvania denied reimbursement for parents who sought independent evaluations that did not result in changes to an IEP or an adjudication that it was inappropriate.[177] The court also refused to permit reimbursement for parents who obtained educational services privately since there was no evidence suggesting that they were needed or that the student would not have made reasonable educational progress without them.

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[172] Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242 [115 Educ. L. Rep. 787] (D. Vt. 1996).

[173] Still v. DeBuono, 101 F.3d 888 [114 Educ. L. Rep. 743] (2d Cir. 1996), *aff'g* 927 F. Supp. 125 [110 Educ. L. Rep. 183] (S.D.N.Y. 1996).

[174] Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895 [114 Educ. L. Rep. 1042] (7th Cir. 1996), *aff'g* Monticello Sch. Dist. No. 25 v. Illinois State Bd. of Educ., 910 F. Supp. 446 [106 Educ. L. Rep. 555] (C.D. Ill. 1995).

[175] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997).

[176] Independent Sch. Dist. No. 283 v. S.D. by J.D. 948 F. Supp. 860 [115 Educ. L. Rep. 747] (D. Minn. 1995), *aff'd* 88 F.3d 556 [110 Educ. L. Rep. 987] (8th Cir. 1996); Wall v. Mattituck-Cutchogue Sch. Dist., 945 F. Supp. 501 [114 Educ. L. Rep. 834] (E.D.N.Y. 1996); Roy and Anne M. v. Valparaiso Community Sch., 951 F. Supp. 1370 (N.D. Ind. 1997); Cypress Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245 [119 Educ. L. Rep. 803] (5th Cir. 1997); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607 [120 Educ. L. Rep. 1112] (8th Cir. 1997).

[177] Jonathan G. v. Lower Merion Sch. Dist., 955 F. Supp. 413 [116 Educ. L. Rep. 1000] (E.D. Pa. 1997).

In the first of two cases from New York, the Second Circuit reversed a preliminary injunction which required a school district to reimburse parents for privately obtained services.[178] The panel ruled that the trial court abused its discretion by ordering retroactive relief in the form of a preliminary injunction contrary to its standards. Although issues of material fact remained over whether a school offered a FAPE, a district court in New York denied tuition reimbursement on the basis of laches since the parents waited three years to file suit.[179]

Compensatory Services

A state court in Connecticut ordered a special school district to provide compensatory educational services to a nineteen-year-old special education student who had not received any assistance while he was a pretrial detainee of the Department of Corrections.[180] At the same time, the court reversed a hearing officer's declaration that the services had to be delivered at a specific residential school. The court held that this order was premature because the student's future educational needs were not known when it was issued.

The federal district court in Minnesota decided that a student whose mother withdrew him from speech therapy after much conflict with school officials was not entitled to compensatory services.[181] Insofar as the mother rejected the services that were offered, the court did not believe that the student was entitled to therapy to make up for the time that he missed.

Where a school district ceased providing services to a student who was severely injured in an automobile accident because the school district did not receive the medical information that it requested from the student's doctors, a federal trial court in New York held that the student was not entitled to compensatory services.[182] The court stated that the parents failed to demonstrate that the student regressed due to the school district's failure to provide a FAPE in a timely and consistent manner.

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[178] Malkentzos v. DeBuono, 102 F.3d 50 [114 Educ. L. Rep. 786] (2d Cir. 1996), rev'g 923 F. Supp. 505 [109 Educ. L. Rep. 646] (S.D.N.Y. 1996).

[179] Phillips v. Board of Educ. of the Hendrick Hudson Sch. Dist., 949 F. Supp. 1108 [115 Educ. L. Rep. 838] (S.D.N.Y. 1997).

[180] State of Connecticut–Unified Sch. Dist. No. 1 v. State Dep't of Educ., 699 A.2d 1077 [120 Educ. L. Rep. 1095] (Conn. Super. Ct. 1997).

[181] Moubry v. Independent Sch. Dist. No. 696 (ELY), 951 F. Supp. 867 [116 Educ. L. Rep. 165] (D. Minn. 1996).

[182] Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [122 Educ. L. Rep. 434] (N.D.N.Y. 1997).

Attorney Fees

Courts summarily granted attorney fees in cases where there was little question that the parents were the prevailing parties.[153] Further, the federal district court in Puerto Rico awarded attorney fees to parents who had received some relief for a significant issue in their litigation.[154] Similarly, a state appellate court in Indiana granted fees to parents who prevailed on their claim that their pre-school child required a regular education component as part of his total program, even though the court did not grant the parents the particular placement they desired.[155]

The trial court for the District of Columbia awarded attorney fees to parents in a suit that was eventually found to be moot.[156] After the school district attempted to change the students' placements, the parents prevailed at the administrative level. The district appealed but the case lingered on for more than five years until it was dismissed as moot. In a unique, if not legally sound, argument, the district claimed that the parents were not entitled to fees because they did not prevail at the judicial level and only prevailing plaintiffs could collect fees. The court, offering that the IDEA allows fee awards to prevailing parents, not just those who are plaintiffs, contended that the parents succeeded in preserving the administrative decision.

Parents may be entitled to attorney fees even if no administrative or judicial proceedings takes place. According to a federal trial court in New York, parents are entitled to attorney fees if a school district revises its placement recommendations in response to their request for a due process hearing.[157] However, in order to obtain the award, the court indicated that a parent must show a causal connection between the relief obtained and the legal action for which fees are requested. Similarly, a district court in Alabama awarded attorney fees in determining that despite a lengthy period of inactivity, a district reassessed a high school student only after his mother asked for a due process hearing.[158] The court pointed out that since the mother's request for a hearing caused a change in the child's placement, there was compelling evidence that the mother's action led to the relief that she sought.

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[153] Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242 [115 Educ. L. Rep. 787] (D. Vt. 1996); Fowler v. Unified Sch. Dist., 107 F.3d 797 [116 Educ. L. Rep. 547] (10th Cir. 1997), *vac'd and rem'd on other grounds* 117 S. Ct. 2503 (1997) (mem.), *on remand* 129 F.3d 1431 [122 Educ. L. Rep. 391] (10th Cir. 1997); Bayonne Bd. of Educ. v. R.S. by K.S., 954 F. Supp. 933 [116 Educ. L. Rep. 927] (D.N.J. 1997).

[154] Gonzalez v. Puerto Rico Dep't of Educ., 969 F. Supp. 801 [120 Educ. L. Rep. 452] (D.P.R. 1997).

[155] Madison Area Educ. Special Servs. Unit v. Daniels, 678 N.E.2d 427 [117 Educ. L. Rep. 719] (Ind. Ct. App. 1997).

[156] Smith v. Roher, 954 F. Supp. 359 [116 Educ. L. Rep. 917] (D.D.C. 1997).

[157] Shanahan v. Board of Educ. of the Jamesville-Dewitt Sch. Dist., 953 F. Supp. 440 [116 Educ. L. Rep. 614] (N.D.N.Y. 1997).

[158] W.T. by Tatum v. Andalusia City Schs., 977 F. Supp. 1437 [122 Educ. L. Rep. 144] (M.D. Ala. 1977).

The federal trial court in Vermont decreed that fees are available to plaintiffs who succeed in filing suit under the IDEA's complaint resolution procedures.[189] The court reasoned that since the complaint resolution process is a procedure as referenced in section 1415 of the IDEA, it is one for which attorney fees are authorized.

In Minnesota, the federal district court granted a partial fee award in agreeing that parents had minimal success at the hearing level.[190] However, since the court overturned most of what the parents gained through the administrative hearings, it did not permit them to receive full reimbursement.

Parental requests for reimbursement of attorney fees were denied by a number of courts.

For example, the Third Circuit, in reversing a judgment from the federal trial court in New Jersey, observed that the parents were not the prevailing party since they did not obtain the relief they sought.[191]

In the first of two cases from Illinois that reached the Seventh Circuit, the panel rejected a fee award on behalf of parents whose request that their son be assessed by specific evaluators was rebuffed by the district court.[192] The Seventh Circuit affirmed that a trial court in Illinois did not abuse its discretion in denying parents attorney fees where the district's IEP was deemed appropriate. However, the parents obtained reimbursement for the private school the student attended pursuant to a hearing officer's conclusion that a previous IEP was flawed.[193] In a third case from Illinois, a district court denied attorney fees in asserting that the parents did not succeed on the merits of their claim and that any benefits they received through their due process claim were incidental to the relief they sought.[194]

The federal trial court in Maryland denied fees where a parent asked for a hearing while the school district was in the process of locating an appropriate residential facility.[195] The court ascertained that the student's ultimate placement resulted from that process, not from the hearing officer's adjudication. The same court also refused to grant fees where the state voluntarily agreed to fund a private placement before due process hearings were conducted.[196]

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[189] Upper Valley Ass'n of Handicapped Citizens v. Blue Mountain Union Sch. Dist. No. 21, 973 F. Supp. 429 [121 Educ. L. Rep. 71] (D. Vt. 1997).

[190] Independent Sch. Dist. No. 283 v. S.D. by J.D., 948 F. Supp. 892 [115 Educ. L. Rep. 779] (D. Minn. 1996).

[191] D.R. v. East Brunswick Bd. of Educ., 109 F.3d 896 [117 Educ. L. Rep. 51] (3d Cir. 1997), *rev'g* 838 F. Supp. 184 (D.N.J. 1993).

[192] Jodlowski v. Valley View Community Unit Sch. Dist. #365U, 109 F.3d 1250 [117 Educ. L. Rep. 76] (7th Cir. 1997).

[193] Monticello Sch. Dist. No. 25 v. George L., 102 F.3d 895 [114 Educ. L. Rep. 1042] (7th Cir. 1996), *aff'g* Monticello Sch. Dist. No. 25 v. Illinois State Bd. of Educ., 910 F. Supp. 446 [106 Educ. L. Rep. 555] (C.D. Ill. 1995).

[194] Petrovich v. Consolidated High Sch. Dist. #230, Palos Hills, 959 F. Supp. 884 [118 Educ. L. Rep. 96] (N.D. Ill. 1997).

A district court in Alabama denied fees where parents sought a due process hearing without first presenting their concerns to the school system.[197] In addition to finding that a due process hearing was not warranted at that time, the court maintained that once the school officials learned of the parents' dissatisfaction, they were fully cooperative and were willing to further assess the best methods for providing the student with a FAPE.

A state appellate court in New York denied fees to a parent who hired an attorney to help her have her son's classification changed to include attention deficit disorder. The attorney wrote two letters and attended one meeting.[198] Even though the school district issued an IEP incorporating changes requested by the attorney, the court was of the opinion that the right to fees was not triggered since no proceedings had been commenced.

State Immunity

According to the federal district court in the state of Minnesota, the state is not immune to suits under the IDEA.[199] The court acknowledged that in the 1990 amendments to the IDEA, Congress unequivocally expressed its intent to abrogate states' immunity for any violations of the statute.

Other IDEA Issues

In a highly controversial dispute, the federal Department of Education withheld more than $50 million in Virginia's special education funds due to the state's policy of not providing services to students with disabilities who were expelled from school. The Fourth Circuit upheld the Department's determination but later reversed itself following an *en banc* rehearing wherein it posited that in order to be bound by a condition upon the receipt of federal funds, Congress must affirmatively impose such a requirement in clear and unmistakable statutory terms.[200] Insofar as the court interpreted Congressional action as not requiring states to have policies in effect that assure the rights of students who are expelled to FAPEs, the court would not permit the Department to withhold Virginia's funds. Congress subsequently amended the IDEA to make it clear that disabled students must be educated during an expulsion.[201]

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[195] Moncriette-Taylor v. Vance, 945 F. Supp. 106 [114 Educ. L. Rep. 803] (D. Md. 1996).

[196] Correa v. Vance, 950 F. Supp. 118 [115 Educ. L. Rep. 890] (D. Md. 1996).

[197] W.L.G. v. Houston County Bd. of Educ., 975 F. Supp. 1317 [121 Educ. L. Rep. 660] (M.D. Ala. 1977).

[198] Leslie E. v. Bethlehem Cent. Sch. Dist., 652 N.Y.S.2d 891 [115 Educ. L. Rep. 460] (N.Y. App. Div. 1997).

[199] Peter v. Johnson, 958 F. Supp. 1383 [117 Educ. L. Rep. 943] (D. Minn. 1997).

In separate action, the Fourth Circuit declared that it is ultimately the state's responsibility to ensure that each student within its jurisdiction is provided a FAPE.[202] In a suit filed by a parent seeking a residential placement, the court mandated that a state may be accountable if it fails to comply with its duty to assure that the IDEA's substantive requirements are implemented.

State Laws

Special education is governed by state and federal law. Although each state's special education statutes must be consistent with the IDEA, differences do exist. Most states have legislation that is similar to the IDEA, but several have requirements that go beyond its scope. Some states have higher standards of what constitutes a FAPE and/or stricter procedural requirements. In other instances, state laws establish procedures for the implementation of special education programs that are not explicitly covered by federal law. Consequently, federal and state courts frequently are called upon to interpret those provisions.

California

The Ninth Circuit affirmed that a county could not challenge a student's classification as seriously emotionally disturbed on the ground that state law conferred the sole authority to make such eligibility decisions on school districts.[203] The court offered that county officials could participate in an IEP meeting only after a residential placement was recommended for a student who was seriously emotionally disturbed.

Illinois

In a dispute over who was responsible for the special education costs of a foster child, a state appellate court in Illinois affirmed that the district where the child's natural parents lived had to reimburse the system of the care givers.[204] The court pointed out that the natural parents were still the child's legal guardians.

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[200] Commonwealth of Virginia Dep't of Educ. v. Riley, 106 F.3d 559 [116 Educ. L. Rep. 40] (4th Cir. 1997), *rev'g* 86 F.3d 1337 [110 Educ. L. Rep. 552] (4th Cir. 1996).

[201] IDEA Amendments of 1977, § 612(a)(1)(A).

[202] Gadsby v. Grasmick, 109 F.3d 940 [117 Educ. L. Rep. 58] (4th Cir. 1997).

[203] County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458 (9th Cir. 1996).

An appellate court in Illinois agreed that the state school for the deaf had to accept a student with multiple disabilities including a severe hearing impairment.[205] The court noted that state law required the school to accept students between the ages of three and twenty-one who were diagnosed as having hearing impairments including those with secondary disabilities if, as was the case here, it could provide a FAPE.

Kansas

According to the federal district court in Kansas, that state does not have a higher standard of appropriateness than the IDEA.[206] In fact, the court indicated that since the measure in question paralleled the Supreme Court's standard in *Rowley*, there was no evidence to indicate that the state legislature intended to bind itself to a higher duty.

Massachusetts

The federal district court in Massachusetts rejected a claim of educational malpractice under state law.[207] A mother had sought damages for a school district's alleged failure to provide a FAPE for her son.

New York

In yet another round of the long-standing New York litigation involving the creation of a special school district whose boundaries are coterminous with a village inhabited by members of the Satmar Hasidic sect, the state's highest court affirmed that the most recent version of the statute was unconstitutional.[208] The court argued that since only one village out of more than 1,500 municipalities in the state met the requirements in the statute for the creation of the special district, the act was not a generally applicable, religion-neutral law. It is likely that this issue will finally be put to rest as a result of *Aguilar v. Felton*.

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[204] Board of Educ. of Community Unit Sch.-Dist. No. 428 v. Board of Educ. of High Sch. Dist. No. 214, 680 N.E.2d 450 [119 Educ. L. Rep. 597] (Ill. App. Ct. 1997).

[205] People v. Conaghan, 684 N.E.2d 1067 [121 Educ. L. Rep. 801] (Ill. App. Ct. 1997).

[206] Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512, 959 F. Supp. 1338 [118 Educ. L. Rep. 147] (D. Kan. 1997).

[207] Doe v. Town of Framingham, 965 F. Supp. 226 [119 Educ. L. Rep. 109] (D. Mass. 1997).

[208] Grumet v. Cuomo, 90 N.Y.2d 57, 659 N.Y.S.2d 173 [119 Educ. L. Rep. 603] (N.Y. 1997).

Rhode Island

The Supreme Court of Rhode Island stated that a registered nurse retained by a district to provide services to a disabled student pursuant to his IEP was not subject to the regulation that required school health nurses to be certified as nurse-teachers.[209] The court mandated that the nurse was not part of the school health program as she did not provide services to other students, did not engage in instructional activities, and did not render any other services to the district.

Discrimination Under the Rehabilitation Act, Section 504

Section 504 of the Rehabilitation Act of 1973, as amended, provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance . . . ."[210] Section 504 effectively prohibits any recipient of federal funds from discriminating against individuals with disabilities in the provision of services or employment. Section 504 applies to any agency that receives federal funds, not just schools.

A person is considered to have a disability under section 504 if he or she has a physical or mental impairment that substantially limits one or more of life's major activities, has a record of such an impairment, or is regarded as having such an impairment.[211] Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[212] According to the Supreme Court, a person is otherwise qualified for purposes of section 504 if he or she is capable of meeting all of a program's requirements in spite of the disability.[213] If a person is otherwise qualified, a recipient of federal funds is expected to make reasonable accommodations for his or her disabilities unless doing so would create an undue hardship.[214]

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[209] Rhode Island Dep't of Elementary and Secondary Educ. v. Warwick Sch. Comm., 696 A.2d 281 [119 Educ. L. Rep. 552] (R.I. 1997).

[210] 29 U.S.C. § 794.

[211] 29 U.S.C. § 706(7)(B).

[212] 34 C.F.R. § 104.3(j)(2)(ii).

[213] School Bd. of Nassau County v. Arline, 480 U.S. 273 [37 Educ. L. Rep. 448] (1987); Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[214] 34 C.F.R. § 104.12(a).

Students

Elementary and Secondary

Students with disabilities in elementary and secondary schools have rights under both section 504 and the IDEA. Often students and their parents file suits that state claims under both statutes. Frequently, the claims asserted under one statute are identical or similar to those stated under the other even though sometimes distinct claims are filed under section 504.

Where a school nurse in Missouri who was concerned that a student's prescribed medication exceeded the maximum recommended dosage refused to administer it, parents unsuccessfully alleged a violation of section 504. The Eighth Circuit affirmed that the parents did not produce any evidence that the nurse refused to administer the medication due to the student's disability rather than on the basis of school district policy and concerns about his condition.[215] Similarly, the federal trial court in Maryland dismissed a parent's discrimination claims after finding no evidence that the district intentionally discriminated against the student or denied him services because of his disability.[216]

A district court in Indiana reflected that a district did not discriminate against a student who had not been identified as disabled before school officials expelled her for threatening other children with a knife.[217] Finding that a plaintiff must show bad faith or gross misjudgment along with the failure to provide a FAPE in a section 504 claim, a federal trial court in New York dismissed such a suit on the ground that the school district had provided a FAPE.[218]

The issue of disabled students' eligibility to participate in sports activities was litigated once again. The Eleventh Circuit vacated and remanded as moot a judgment from Florida that would have granted a preliminary injunction to permit an over-aged student to participate in athletics.[219] Conversely, the Supreme Court of Montana reversed a preliminary injunction that prevented an athletic association from enforcing its age rule against a student with a learning disability.[220] The court, noting that participation in sports is a privilege not a right, did not agree that exceptional circumstances existed to warrant the issuance of the preliminary injunction.

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[215] Davis v. Howell Sch. Dist., 104 F.3d 204 [115 Educ. L. Rep. 333] (8th Cir. 1997). *See also* DeBord v. Ferguson Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997).

[216] McGraw v. Board of Educ. of Montgomery County, 952 F. Supp. 248 [116 Educ. L. Rep. 267] (D. Md. 1997).

[217] Brown v. Metropolitan Sch. Dist. of Lawrence Township, 945 F. Supp. 1202 [114 Educ. L. Rep. 861] (S.D. Ind. 1996).

[218] Wenger v. Canastota Cent. Sch. Dist., 961 F. Supp. 416 [118 Educ. L. Rep. 288] (N.D.N.Y. 1997).

[219] Johnson v. Florida High Sch. Activities Ass'n, 102 F.3d 1172 [117 Educ. L. Rep. 40] (11th Cir. 1997), *vacating and remanding*, 899 F. Supp. 579 [104 Educ. L. Rep. 204] (M.D. Fla. 1995).

[220] M.H. v. Montana High Sch. Ass'n, 929 P.2d 239 [115 Educ. L. Rep. 94] (Mont. 1996).

The Sixth Circuit vacated an injunction that would have allowed a student in Michigan who repeated eleventh grade to participate in basketball in his senior year in spite of an eight semester eligibility rule.[221] The court reasoned that requiring a waiver of the eight semester rule would not only result in a fundamental alteration of the high school sports program but would also impose an immense financial and administrative burden on the athletic association.

A federal district court in Missouri observed that a private school was not required to provide a scent-free environment to a student who suffered from life-threatening asthma and allergies.[222] The school had offered a voluntary scent-free environment whereby students and faculty voluntarily refrained from wearing scents in the classroom but refused to institute a mandatory scent-free policy. The court pointed out that the school had more than met requirements by offering the voluntary scent-free environment.

The federal district court in Puerto Rico ascertained that a private school was required to provide accommodations to a student who was suspended for refusing to follow his teacher's requests and referring to the teacher with expletives.[223] The court was of the opinion that the school violated section 504 by refusing to allow the student to return to school with physician-prescribed medication and treatment for his attention deficit hyperactivity disorder.

Higher Education

The Seventh Circuit affirmed that the section 504 rights of a candidate for admission to the bar in Illinois were not violated when officials in his law school gave him a poor recommendation, prompting the board of examiners to require the student to undergo a character and fitness interview.[224] The court agreed that imposition of these additional requirements did not constitute an adverse consequence.

As reflected by a case from Virginia, the onus is on the person with a disability to show that reasonable accommodations are required. A student in a physicians assistant program who claimed to be learning disabled sued his college alleging that it failed to provide reasonable accommodations. A federal district court dismissed the suit in holding that the student failed to submit proper documentation that he required special accommodations because he was learning disabled.[225]

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[221] McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453 [120 Educ. L. Rep. 96] (6th Cir. 1997), *vacating* 77 F.3d 883 (6th Cir. 1996) (dismissed as moot).

[222] Hunt v. St. Peter Sch., 963 F. Supp. 843 [118 Educ. L. Rep. 663] (W.D. Mo. 1997).

[223] Bercovitch v. Baldwin Sch., 964 F. Supp. 597 [118 Educ. L. Rep. 983] (D.P.R. 1997).

[224] Rothman v. Emory Univ., 123 F.3d 446 [120 Educ. L. Rep. 984] (7th Cir. 1997).

An individual with a disability is not otherwise qualified if he or she is unable to meet a program's minimum requirements. In two separate suits, district courts in Virginia judged that students who were denied admission to medical school[226] and graduate school[227] in social work were not otherwise qualified since they had not met the minimum grade point average requirements of the respective programs.

In Massachusetts, students with disabilities filed a class action suit after a college revised its policies and procedures for providing accommodations. Under the new policy, students with learning disabilities were required to provide documentation that was not more than three years old and requests for accommodation were subjected to several tiers of review. The federal district court in Massachusetts granted class certification but limited the class to currently enrolled students.[228] Subsequently, the court ruled that several aspects of the policy violated section 504 by imposing significant additional burdens on students with disabilities and tended to screen out those who were learning disabled.[229]

Other Section 504 Issues

The federal trial court in the District of Columbia asserted that damages are available to plaintiffs who prevail on section 504 claims.[230] However, a federal trial court in Virginia decreed that although monetary damages are available under section 504, a plaintiff must show intentional discrimination, bad faith, or the intentional deprivation of special education services to recover such damages.[231] According to the court, an aggrieved party must allege more than mere negligence.

A student in Missouri who was granted a preliminary injunction allowing him to participate in sports that was later overturned unsuccessfully sought attorney fees. The student argued that he was the prevailing party because he had actually played pursuant to the preliminary injunction before it was overturned. The Eighth Circuit reversed the award of attorney fees since it was not persuaded that he was successful on the merits of his action.[232]

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[225] Dubois v. Alderson-Broaddus College, 950 F. Supp. 754 [115 Educ. L. Rep. 912] (N.D. W.Va. 1997).

[226] Betts v. Rector and Visitors of the Univ. of Va., 967 F. Supp. 882 [119 Educ. L. Rep. 470] (W.D. Va. 1997).

[227] Gent v. Radford Univ., 976 F. Supp. 391 [121 Educ. L. Rep. 738] (W.D. Va. 1997).

[228] Guckenberger v. Boston Univ., 957 F. Supp. 306 [117 Educ. L. Rep. 500] (D. Mass. 1997).

[229] Guckenberger v. Boston Univ., 974 F. Supp. 106 [121 Educ. L. Rep. 541] (D. Mass. 1997).

[230] Walker v. District of Columbia, 969 F. Supp. 794 [120 Educ. L. Rep. 447] (D.D.C. 1997).

[231] Sellers v. School Bd. of the City of Manassas, 960 F. Supp. 1006 [118 Educ. L. Rep. 215] (E.D. Va. 1997). *See also* Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [122 Educ. L. Rep. 434] (N.D.N.Y. 1997).

Americans with Disabilities Act

The Americans with Disabilities Act (ADA),[233] which was enacted in 1990, is designed to prohibit discrimination against persons with disabilities in a wide range of activities sponsored by private as well as public entities. The ADA's greatest impact is on the private sector; yet, since many of its provisions apply to public entities and are similar in scope to those of section 504, suits filed under the ADA should interest consumers of education law. Generally, compliance with section 504 results in meeting the ADA's dictates; however, several provisions of the ADA addressed loopholes in section 504 and codified judicial interpretations of the Rehabilitation Act. Many cases that arise in the public sector are now brought on the basis of the ADA as well as section 504. In most suits, the disposition for both laws is identical. Decisions that were discussed in the section 504 part of this chapter that had identical decisions rendered under the ADA are not repeated here.[234]

Students

Elementary and Secondary

The federal district court in Arizona maintained that a student's confinement in a time-out room for disciplinary purposes did not violate the ADA.[235] The student attended a publicly operated school for emotionally disturbed students and was sent to its time-out room for calling a teacher's aide a "faggot." The court posited that the child was not excluded from any program or activity due to his disability and was not treated differently from any other student at the school.

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[232] Pottgen v. Missouri State High Sch. Activities Ass'n, 103 F.3d 720 [115 Educ. L. Rep. 297] (8th Cir. 1997).

[233] 42 U.S.C. § 12101 et seq.

[234] *See* Davis v. Howell Sch. Dist., 104 F.3d 204 [115 Educ. L. Rep. 333] (8th Cir. 1997); McGraw v. Board of Educ. of Montgomery County, 952 F. Supp. 248 [116 Educ. L. Rep. 267] (D. Md. 1997); Johnson v. Florida High Sch. Activities Ass'n, 102 F.3d 1172 [117 Educ. L. Rep. 40] (11th Cir. 1997), *vacating and remanding* 899 F. Supp. 579 [104 Educ. L. Rep. 204] (M.D. Fla. 1995); Dubois v. Alderson Broaddus College, 950 F. Supp. 754 [115 Educ. L. Rep. 912] (N.D. W.Va. 1997); Guckenberger v. Boston Univ., 957 F. Supp. 306 [117 Educ. L. Rep. 500] (D. Mass. 1997); Pottgen v. Missouri State High Sch. Activities Ass'n, 103 F.3d 720 [115 Educ. L. Rep. 297] (8th Cir. 1997); Bercovitch v. Baldwin Sch., 964 F. Supp. 597 [118 Educ. L. Rep. 983] (D.P.R. 1997); McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453 [120 Educ. L. Rep. 96] (6th Cir. 1997); Betts v. Rector and Visitors of the Univ. of Virginia, 967 F. Supp. 882 [119 Educ. L. Rep. 470] (W.D. Va. 1997); Rothman v. Emory Univ., 123 F.3d 446 [120 Educ. L. Rep. 984] (7th Cir. 1997); Guckenberger v. Boston Univ., 974 F. Supp. 106 [121 Educ. L. Rep. 541] (D. Mass. 1997); Gent v. Radford Univ., 976 F. Supp. 391 [121 Educ. L. Rep. 738] (W.D. Va. 1997); DeBord v. Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997).

The Eighth Circuit affirmed that the refusal of school officials to give an elevator key to a student in Minnesota who was physically disabled when she first requested one did not violate the ADA.[236] The trial court acknowledged that before giving the key to the student, school officials wanted to verify that it was safe for her to use the elevator independently.

Higher Education

A student whose mental illness caused him to suffer panic attacks when forced to interact with the public claimed that college officials failed to accommodate his disability by not allowing him to participate in a residency program. In concluding that residency was a core requirement of the masters degree program, a federal trial court in New York stated that the student's requested accommodation was unreasonable as it constituted a substantial modification of the educational program.[237]

In West Virginia, a federal district court interpreted the ADA as not requiring the National Board of Medical Examiners to provide additional time and a separate room for each of three students with attention deficit disorder who were taking the medical licensing test.[238] The court noted that since each of the students had a history of significant scholastic achievement, they did not have any substantial limitations on their learning abilities. Thus, the court decided that the students did not suffer from an impairment that substantially limited the life activity of learning in comparison to most people.

A district court in Virginia summarily dismissed a lawsuit filed on behalf of disabled students which alleged that the state's colleges and universities failed to provide voter registration services.[239] Insofar as the institutions did not provide voter registration services to any of their students, the court declared that the ADA did not require them to do so for individuals with disabilities.

In New Jersey, a student with a learning disability who had been classified as a nonqualifier by the National Collegiate Athletic Association

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[235] Rasmus v. Arizona, 939 F. Supp. 709 [113 Educ. L. Rep. 734] (D. Ariz. 1996).

[236] Hoekstra v. Independent Sch. Dist. No. 283, St. Louis Park, 103 F.3d 624 [115 Educ. L. Rep. 293] (8th Cir. 1996), aff'g 916 F. Supp. 941 [107 Educ. L. Rep. 779] (D. Minn. 1996).

[237] Maczaczyj v. State, 956 F. Supp. 403 [117 Educ. L. Rep. 134] (W.D.N.Y. 1997).

[238] Price v. National Bd. of Med. Examiners, 966 F. Supp. 419 [119 Educ. L. Rep. 390] (S.D. W. Va. 1997).

[239] National Coalition for Students with Disabilities Educ. and Legal Defense Fund v. Allen, 961 F. Supp. 129 [118 Educ. L. Rep. 279] (E.D. Va. 1997).

(NCAA) because he took several special education courses in high school unsuccessfully filed a discrimination suit.[240] The federal district court indicated that counting the special education classes as core courses without regard for their content or level would have required the NCAA to abandon its eligibility requirements. According to the court, such a requested modification would have been unreasonable as it would have fundamentally altered the nature of the privilege of participating in the athletic program.

Conclusion

Consistent with past years, litigation involving students with disabilities continued at a brisk pace in 1997. Moreover, most of the lawsuits continued to involve placement and procedural issues.

Probably the most significant legal development in special education during the year was the passage of the Individuals with Disabilities Education Act Amendments of 1997. However, since the amendments were not signed into law until midway through the year, very little litigation arose based on the provisions of the amendments.

The Supreme Court did not hear any special education cases in 1997 but did vacate three federal appellate decisions involving the delivery of services to students in parochial schools. The court sent each of these cases back to appeals panels to consider the effect that the 1997 Amendments had on the issues at bar. Subsequently, two of the courts handed down judgments that did not substantially change their original rulings. The court did issue an opinion in a Title I case that can be expected to impact upon the delivery of special education services to students with disabilities who attend parochial schools.

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[240] Bowers v. National Collegiate Athletic Ass'n, 974 F. Supp. 459 [121 Educ. L. Rep. 154] (D.N.J. 1997).

6
TORTS

William J. Evans, Jr.

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Introduction

Tort law offers remedies to individuals for harm caused by the unreasonable conduct of others. This chapter examines cases brought by or on behalf of students, school employees and, in some instances, visitors on school grounds. Tort actions resulting from interscholastic athletics are discussed in Chapter 7, "Sports."

Negligence

Negligence is the most common tort committed by school personnel. A tort can arise when an improper act, or failure to act, causes an injury to another. In addition, an individual cannot be liable for a tort unless there is a causal relationship between the alleged conduct and the injury. When an injured party claims that a tort has occurred, the behavior of school personnel is measured against what a reasonable and prudent professional of similar training and experience would, or should, have done in the same or similar circumstances.

Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases are divided into categories depending on where or how an injury was sustained and when the defense was not sovereign or statutory immunity.

Off School Property and After School Hours

A high school student who was rendered a quadriplegic due to an after school, off-premises fight with a classmate appealed a grant of summary judgment in favor of the district in his negligent supervision suit. The Supreme Court of Kansas affirmed on the basis that there was no relationship between the district and the student that would have imposed a duty of care on it even though the school had a policy of imposing suspension for such fights.[1]

In New York, parents sought further review of the denial of their motion for summary judgment when the teacher of their homebound child sued them for negligent supervision after their son assaulted the teacher. An appellate court reversed in favor of the parents.[2] The court found that there was no evidence that the parents had knowledge of their son's tendency to engage in violent conduct prior to his assaulting the teacher.

A high school student and his mother challenged a grant of summary judgment in favor of a district when they sued it for gross negligence in the hiring and supervision of a teacher with whom he had engaged in improper sexual conduct off of school property. An appellate court in South Carolina affirmed that there was insufficient evidence that the district was put on notice of the teacher's inappropriate sexual proclivities.[3]

Beshears v. Unified Sch. Dist. No. 305, 930 P.2d 1376 [115 Educ. L. Rep. 1074]
Decker v. Chamberlain, 652 N.Y.S.2d 175 [115 Educ. L. Rep. 64] (Kan. 1997).
Moore v. Berkeley County Sch. Dist., 486 S.E.2d 9 [118 Educ. L. Rep. (N.Y. App. Div. 1996).
App. 1997). *See* Anonymous v. Lyman War Military Academy, 1222] (S.C. Ct.
Educ. L. Rep. 352] (Ala. Ct. App. 1997) (affirming that a school 701 So. 2d 25 [122
employee was not acting within the scope of his employment was not liable since an
molested a student). when he allegedly

The court acknowledged that the way the teacher conducted her class and her inappropriate behavior with students was never reported to school authorities.

The mother of a junior high school student who was fatally shot after a dispute with another student while collecting admissions at a faculty-student basketball game disputed a ruling in favor of a city school board, principal, and coach. An appellate court in Tennessee agreed that there was no evidence that the shooting was foreseeable.[4]

A student who was severely and permanently injured in a fight with another student on a public sidewalk in front of their neighboring schools unsuccessfully sued his own school. The sole issue on appeal was whether the plaintiff's school and/or its administrators owed him a duty of supervision during non-class hours when students are not on the school's premises or otherwise involved in school-related or sponsored activities. An appellate court in Florida affirmed that there was no such duty because this would have essentially made school officials insurers of all students' safety until they returned home each day.[5]

The parents of children who were killed in an off premises automobile accident questioned a grant of summary judgment in favor of a school district in their suit for negligent supervision based on its failure to enforce a closed campus policy. An appellate court in Arizona affirmed that the district was not liable on the theory of negligent performance of a voluntary protective undertaking.[6] The court ascertained that the district's failure to enforce the policy did not breach its general duty to avoid exposing others to a foreseeable risk of harm.

In California, an appellate court addressed whether a school district's duty to supervise the conduct of its students affords protection to nonstudents who are injured by the actions of students. The court reversed in favor of a pedestrian who was injured by a car driven by student who was exiting the school parking lot.[7] The court decided that it was foreseeable that a student might cause an accident by recklessly exiting the parking lot at the end of the school day.

School Settings During School Hours

A student sued both the administrator who sexually molested her while she was a thirteen-year-old in middle school and the district where the administrator previously worked. The student claimed that the first district was at fault because the positive letter of recommendation that the administrator received failed to disclose that he had been disciplined for alleged sexual misconduct with pupils. The Supreme Court of California affirmed that the writer of a letter of recommendation owes perspective employers and third persons a duty not to misrepresent the facts in describing an applicant's qualifications and character if doing so would present a substantial, foreseeable risk of physical injury to the employer or third parties.[8] The court added that the student did not have to rely on the first district's misrepresentations but only had to show that her injuries were caused by her school's reliance on the letter of recommendation.

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[4] Kindred v. Board of Educ. of Memphis City Schs., 946 S.W.2d 47 [118 Educ. L. Rep. 1227] (Tenn. Ct. App. 1997).

[5] Concepcion v. Archdiocese of Miami, 693 So. 2d 1103 [118 Educ. L. Rep. 1243] (Fla. Dist. Ct. App. 1243).

[6] Tollenaar v. Chino Valley Sch. Dist., 945 P.2d 1310 [121 Educ. L. Rep. 1154] (Ariz. Ct. App. 1997).

[7] Hoff v. Vacaville Unified Sch. Dist., 68 Cal.Rptr.2d 920 [122 Educ. L. Rep. 253] (Cal. Ct. App. 1997).

In a second case from California, a school district sought further review of the denial of its motion for summary judgment when the parents of a student who is developmentally disabled sued it for negligent supervision. An appellate court reversed in favor of the district since there was no evidence supporting a the parents' claim that the child fell from a slide during recess.[9]

The first of five cases from New York was filed by parents who sued a district for negligent supervision and failure to provide a warning that a hydraulic device on a bathroom door was dangerous after their son lost a fingertip when his finger caught in the bathroom door. An appellate court, in deeming the accident unforeseeable, reversed in favor of the district.[10] The court also contended that there was no evidence that the bathroom door posed a risk to students and, regardless, there was no indication that the district had actual or constructive notice of any defect or dangerous condition.

Where a six-year-old student was injured when he fell from monkey bars during recess, the school district disputed the denial of its motion for summary judgment. An appellate court in New York affirmed in favor of the mother.[11] The court determined that there were material issues of fact as to whether the presence or absence of teachers was a contributory factor in the child's injury and whether the composition of material below the monkey bars was suitable.

A board of education challenged a judgment in favor of a student who was injured in a stabbing incident in his classroom. In reversing in favor of the board, an appellate court in New York failed to find that the actions of the teacher were the proximate cause of the student's injuries.[12] The court decided that in light of the complete disdain that the intruders showed to the teacher's initial queries and challenge to their presence, and the speed with which the events unfolded, it was irrational to conclude that her actions led to the student's injuries.

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[8] Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582 [115 Educ. L. Rep. 502] (Cal. 1997).

[9] Rio Linda Unified Sch. Dist. v. Sacramento County Super. Ct., 60 Cal.Rptr.2d 710 [115 Educ. L. Rep. 382] (Cal. Ct. App. 1997).

[10] Walsh v. City Sch. Dist. of Albany, 654 N.Y.S.2d 859 [116 Educ. L. Rep. 1110] (N.Y. App. Div. 1997).

[11] Vonungern v. Morris Cent. Sch., 658 N.Y.S.2d 760 [119 Educ. L. Rep. 214] (N.Y. App. Div. 1997).

Where a student who was trying out for his school's basketball team injured his knee when he caught his foot on a sticky substance on the gym floor, an appellate court in New York affirmed the denial of the district's motion for summary judgment.[13] The court noted there were genuine issues of material fact as to whether district employees affirmatively created a dangerous or defective condition by not properly removing tape from the gym floor.

Another appellate court in New York affirmed the denial of a district's motion for summary judgment in a case filed by a student who was injured while participating in a stick ball game organized by his teacher during recess.[14] The court observed that there were genuine issues of material fact as to whether the teacher's failure to utilize a protective fence unreasonably increased the risk of injury to the student.

Where a four-year-old preschooler was sexually assaulted by another preschooler of the same age in a school restroom, his mother challenged a grant of summary judgment in favor of the school. An appellate court in Tennessee affirmed that while the school owed the student a duty of reasonable care, sexual assault between two four-year-old boys was so unforeseeable that there was no duty to guard against it.[15]

En Route to and from School

A teacher sought further review of a judgment in favor of an eleven-year-old student was injured when he jumped out of the teacher's truck as she was taking him home from school because he had been suspended for fighting. The teacher, who was also an assistant principal at the time, was driving the student home because he missed the bus and she had difficulty contacting his mother. An appellate court in Louisiana reversed in favor of the teacher on the basis that it was not foreseeable that the student would jump out of a moving vehicle.[16]

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[12] Transon v. Board of Educ. of the City of New York, 659 N.Y.S.2d 102 [119 Educ. L. Rep. 600] (N.Y. App. Div. 1997).

[13] Ackler v. Odessa-Montour Cent. Sch. Dist., 663 N.Y.S.2d 352 [121 Educ. L. Rep. 1102] (N.Y. App. Div. 1997).

[14] Stryker v. Jericho Union Free Sch. Dist., 663 N.Y.S.2d 869 [122 Educ. L. Rep. 268] (N.Y. App. Div. 1997).

[15] Roe v. Catholic Diocese of Memphis, 950 S.W.2d 27 [120 Educ. L. Rep. 854] (Tenn. Ct. App. 1997).

[16] Turner v. D'Amico, 701 So. 2d 236 [122 Educ. L. Rep. 357] (La. Ct. App. 1997).

High school students who were stabbed while riding home on the subway challenged the dismissal of their case against a transit authority and board of education for failure to provide police protection on trains that were part of its "Safe Passage" program. An appellate court in New York reversed in holding that the students stated a claim against the transit authority by alleging the existence and breach of a special duty. At the same time, the court affirmed the dismissal against the board because it did not owe the students such a duty.[17]

In a second case from New York, an appellate court reversed in favor of a school district, asserting that a district did not owe a duty of care to a student who was injured after she used a forged note to get off a school bus at a stop other than her usual one. The court reasoned that the student was outside of care and control of the district and bus company at the time of her injury.[18]

In School Buildings and on School Grounds

In the first of three cases from New York, parents sought further review of a grant of summary judgment in favor of a school district where their fifth grade son was injured when he slipped and fell in an accumulation of water in front of his locker. An appellate court affirmed that the district was not liable since it did not have actual or constructive notice of an accumulation of water on the floor.[19]

A district challenged the denial of its motion for summary judgment in a suit filed by a high school student who was injured when she slipped and fell on ice which had accumulated twenty feet outside of her school's gate. An appellate court in New York reversed in favor of the district.[20] The court held that although the district maintained the gate and driveway near the spot where the student fell, it's action did not create a special use for the street and it was not responsible for the street's alleged defective condition.

In New York, a senior citizen who was invited to an elementary school for Ethnic Day unsuccessfully sued the district for negligence when she was injured after being pushed by a third grade student. An appellate court affirmed that since the student's act was spontaneous and unanticipated, the district was not responsible for the woman's injury.[21]

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[17] Reyes v. City of New York, 656 N.Y.S.2d 379 [117 Educ. L. Rep. 379] (N.Y. App. Div. 1997).

[18] Harker v. Rochester City Sch. Dist., 661 N.Y.S.2d 332 [120 Educ. L. Rep. 773] (N.Y. App. Div. 1997).

[19] Lottie v. Edwards-Knox Cent. Sch. Dist., 652 N.Y.S.2d 144 [115 Educ. L. Rep. 58] (N.Y. App. Div. 1997).

[20] Nguyen v. Brentwood Sch. Dist., 658 N.Y.S.2d 343 [118 Educ. L. Rep. 1086] (N.Y. App. Div. 1997).

[21] Borelli v. Blind Brook Unified Sch. Dist., 663 N.Y.S.2d 669 [121 Educ. L. Rep. 1119] (N.Y. App. Div. 1997).

Negligence Defenses

School districts, administrators, and/or teachers involved in negligence actions have a number of defenses available ranging from common law sovereign immunity to more affirmative defenses. The motivation behind common law immunity is to limit the flow of public money to private citizens because such payments detract from the educational functions of the schools. Affirmative defenses bar recovery by parties whose behavior in some way caused their injuries.

Immunity

Common Law (Governmental Immunity)

The reluctance of courts to disturb school district immunity is evident in the following eight cases where the injured parties all failed to prevail in their suits against the districts. A student appealed a grant of summary judgment in favor of her teacher and district officials after she sued to recover for injuries she incurred when assaulted by another pupil. The Supreme Court of Texas affirmed that qualified immunity protected the teacher from personal liability for her actions in preserving classroom discipline.[22] The court recognized that the teacher was not liable because the development and maintenance of a discipline plan required the use of professional judgment and discretion.

In the first of two cases from Alabama, a student unsuccessfully sued a board and county health department for damages when he was exposed to pigeon feces at his high school and contracted crypto coccal meningitis. An appellate court upheld a grant of summary judgment in favor of the defendants since their discretionary acts were entitled to immunity.[23] The court pointed out that checking the school to remedy alleged infestations were based upon personal deliberations rather than hard and fast rules on how to handle pigeon infestations. The court added that officials from the health department did not have a statutory duty to make personal periodic inspections of the school.

A student who was assaulted by classmates when a teacher was not present in the room challenged a grant of summary judgment in favor of the school system. An appellate court in Alabama affirmed that the educators were entitled to qualified immunity.[24] The court agreed that the principal exercised his discretion in deciding how the teacher's classes were to be covered during her half day absence by directing her to have her colleagues act as substitutes. Further, the court posited that the teacher who checked on the room did not see any problems or hear any complaints when she questioned the students.

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[22] Downing v. Brown, 935 S.W.2d 112 [114 Educ. L. Rep. 1265] (Tex. 1996).

[23] Bathgate v. Mobile County Bd. of Sch. Comm'rs, 689 So.2d 109 [116 Educ. L. Rep. 1300] (Ala. Ct. App. 1996).

[24] Foley v. Taylor, 695 So. 2d 1196 [119 Educ. L. Rep. 743] (Ala. Ct. App. 1997).

Where a student was injured during gym class as he was struck in the eye by a deflated soccer ball, an appellate court in Wisconsin affirmed a grant of summary judgment in favor of the school district.[25] The court was of the opinion that the district was entitled to immunity for alleged negligence attributed to the gym teacher's discretionary act in moving the class indoors.

In the first of two cases from North Carolina, a motorist who was injured in an automobile accident with a patrolman who was employed by a board of education questioned a directed verdict in favor of the school system. An appellate court affirmed in favor of the board since it had not waived its governmental immunity.[26] The court acknowledged that the risk management agreement between the city and board did not constitute a risk pool that created such a waiver.

Where a student who left an assembly and was admitted to a locked room by a classmate was subsequently seriously injured when his hand came into contact with the blade of a table saw, an appellate court in North Carolina upheld a grant of summary judgment for the district based on sovereign immunity.[27] However, the court ascertained that since the teacher was sued in his individual capacity, he, as a public employee, was not entitled to such a defense.

While attending a health class, a sixth grade student who followed instructions to sit or kneel on the carpeted classroom floor in order to watch a video student discovered that the blade of an Exacto knife was imbedded in his knee. Subsequently, his parents sought further review of a grant of summary judgment in favor of the district. An appellate court in Pennsylvania affirmed that the student and his parents could not base their claim on the district's real property exception to governmental immunity.[28] The court failed to recognize such an exception in deciding that liability cannot be imposed on a governmental entity for injuries caused by its negligent failure to remove foreign substances from its real estate.

Where the parents of an eight-year-old student who was injured when he was tripped by another child as he ran down a hall, an appellate court in Connecticut agreed that the district was entitled to have a judgment against it set aside.[29] The court found that the district was not liable because even though it may have been foreseeable that a student would run in the hall, it did not believe that this rose to the level that it could overcome an immunity defense.

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[25] Bauder v. Delavan-Darien Sch. Dist., 558 N.W.2d 881 [115 Educ. L. Rep. 1063] (Wis. Ct. App. 1996).

[26] Pharr v. Worley, 479 S.E.2d 32 [114 Educ. L. Rep. 1248] (N.C. Ct. App. 1997).

[27] Mullis v. Sechrest, 484 S.E.2d 423 [118 Educ. L. Rep. 502] (N.C. Ct. App. 1997).

[28] Wolfe v. Stroudsburg Area Sch. Dist., 688 A.2d 1245 [116 Educ. L. Rep. 327] (Pa. Commw. Ct. 1997).

A volunteer at a school-sponsored carnival disputed the dismissal of her negligence action against the district superintendent and principal based on injuries she received when she tripped over an electrical receptacle. An appellate court in Georgia affirmed that since the action of moving a refrigerator, which led to the exposure of the receptacle, was a discretionary, rather than ministerial, act, the administrators were immune from liability.[30]

Statutory Immunity

Plaintiffs had more success with the defense of statutory immunity as they prevailed in the first five of the fourteen reported cases. The parents of kindergarten student who was struck and killed by a van as he tried to cross a road after leaving a school bus appealed the dismissal of their wrongful death action against the district. The Supreme Court of Georgia reversed in favor of the parents.[31] The court ruled that since the child's death did not arise from the use of a school bus within the meaning of its insurance policy, the district waived statutory immunity up to the limits of its liability coverage.

The mother of an eight-year-old child who was injured while playing a game of tag sought further review of the dismissal of her suit against the leaders of an after-school child care program and the district. An appellate court in Illinois reversed in favor of the mother.[32] The court indicated that when one of the adult leaders actively participated in the game, he abandoned his role as supervisor and became an equal competitor who was not entitled to immunity.

Where a high school student who was raped in a locker room sued her district for failure to provide adequate supervision, protection, and security as well as a failure to enact and enforce appropriate rules regulations and policies, it challenged the denial of its motion for summary judgment. An appellate court in Minnesota agreed that the district was not entitled to immunity since two of its employees had seen the assailant before the attack.[13] The court added that the district's not implementing a security policy was not a discretionary action for which immunity was appropriate.

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[29] Purzycki v. Town of Fairfield, 689 A.2d 504 [116 Educ. L. Rep. 714] (Conn. Ct. App. 1997). *See* Gressett v. Newton Separate Mun. Sch. Dist., 697 So. 2d 444 [120 Educ. L. Rep. 365] (Miss. 1997) (affirming that a district was immune from suit even though it failed to protect a student from attack by a school mate).

[30] Larkins v. Cobb County Sch. Dist., 484 S.E.2d 10 [117 Educ. L. Rep. 792] (Ga. Ct. App. 1997).

[31] Roberts v. Burke County Sch. Dist., 482 S.E.2d 283 [116 Educ. L. Rep. 822] (Ga. 1997).

[32] Longfellow by Longfellow v. Corey, 675 N.E.2d 1386 [116 Educ. L. Rep. 744] (Ill. App. Ct. 1997).

The State Transportation Division of the Board of Education sought further review of a jury verdict in favor of the parents of a seven-year-old student who was injured when she was struck by a car as she attempted to cross the street to reach her bus stop. An appellate court in New Mexico affirmed.[14] According to the court, since there was no reason why bus stops could not have been established on both sides of the road, their placement constituted maintenance for which the Division was not entitled to immunity under the state's Tort Claims Act.

After spectators at a parade who were injured when a can of flammable liquid used to light batons of high school majorettes caught fire settled their claims with the sponsors of the event, a jury determined that the school board was 100% liable. On further review, an appellate court in Florida affirmed that while the board's liability was limited by a statutory cap, the sponsors were entitled to reimbursement from it for their settlement costs.[15]

In the first of three cases from Illinois, the mother of a high school student who took his own life unsuccessfully disputed the dismissal of her suit which alleged that the district failed to implement a suicide prevention program or inform her of his threats. An appellate court affirmed that state law did not require the district to implement a suicide prevention program and that both the school system and the child's counselor were entitled to immunity based on the doctrine of in loco parentis.[16]

A district that was sued by the mother of a child who was sexually assaulted as he rode on a school bus challenged the denial of its motion to dismiss her claim. An appellate court in Illinois decreed that the district was immune from liability because the bus that was transporting the child to special education classes outside the district was not operating as a common carrier for the purposes of the common carrier exception to the State's Tort Immunities Act.[17]

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[13] S.W. v. Spring Lake Park Sch. Dist. No. 16, 566 N.W.2d 366 [119 Educ. L. Rep. 1177] (Minn. Ct. App. 1997).

[14] Gallegos v. New Mexico Bd. of Educ., 940 P.2d 468 [119 Educ. L. Rep. 1188] (N.M. Ct. App. 1997). *See* Warrington v. Tempe Elementary Sch. Dist. No. 3, 928 P.2d 673 [114 Educ. L. Rep. 1238] (Ariz. Ct. App. 1996) (holding that a district employee had duty not to subject students to foreseeable harm).

[15] Dade County Sch. Bd. v. Radio Station WQBA, 699 So. 2d 701 [121 Educ. L. Rep. 427] (Fla. Ct. App. 1997).

[16] Grant v. Board of Trustees of Valley View Sch. Dist. No. 365-U, 676 N.E.2d 705 [116 Educ. L. Rep. 1096] (Ill. App. Ct. 1997) *See* Brooks v. Logan 944 P.2d 709 [121 Educ. L. Rep. 358] (Idaho 1997) for a case with similar facts and decision.

[17] Doe v. Rockdale Sch. Dist. No. 84, 679 N.E.2d 771 [119 Educ. L. Rep. 567] (Ill. App. Ct. 1997).

In Illinois, a student who had undergone spine fusion surgery was permanently injured when he was required to participate in a water basketball game during physical education class. The student unsuccessfully sued his district for willful and wanton conduct and negligence. Relying on a strict interpretation of state's Tort Immunity Act, an appellate court affirmed that the district was not liable for injuries caused by improper supervision of an activity on public property.[28]

The mother of a student who was fatally stabbed at school challenged a grant of summary judgment in favor of two principals and the district. An appellate court in Texas affirmed.[29] The court was of the view that negligent failure to discipline a student was not entitled to an exception under the state law that provided immunity for school employees.

Where a student was injured when the private car he was riding in collided with a truck on the way home from a field trip, his parents unsuccessfully sued the district for negligence. An appellate court in California affirmed in favor of the district.[30] The court observed that since the field trip was within the meaning of the state's immunity statute, the district was not liable.

A school system and physical education teacher disputed the denial of their motion for summary judgment in a suit brought on behalf of a student who, despite her reluctance to do so, was instructed to traverse monkey bars and subsequently broke her arm. An appellate court in Georgia reversed in mandating that the defendants were entitled to sovereign immunity since the teacher's directions in telling the student where to stand were discretionary functions.[31]

In Nebraska, a school district and the operator of a recreational camp sought further review of their liability where a parent who volunteered to assist them was injured on a "slide-for-life." An appellate court in Nebraska reversed in favor of the defendants.[32] The court noted that the organization which leased the camp was free from fault under the state's recreation liability act. The court also declared that the district did not owe the parent a duty to inspect for, or warn her of, latent defects in the safety harness that was responsible for her injury.

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[28] Henrich v. Libertyville High Sch., 683 N.E.2d 135 [120 Educ. L. Rep. 752] (Ill. App. Ct. 1997).

[29] Johnson v. Calhoun County Ind. Sch. Dist., 943 S.W.2d 496 [117 Educ. L. Rep. 1131] (Tex. Ct. App. 1997).

[30] Wolfe v. Dublin Unified Sch. Dist., 65 Cal.Rptr.2d 280 [119 Educ. L. Rep. 195] (Cal. Ct. App. 1997).

[31] Crisp County Sch. Sys. v. Brown, 487 S.E.2d 512 [119 Educ. L. Rep. 722] (Ga. Ct. App. 1997).

[32] Teters v. Scottsbluff Pub. Schs., 567 N.W.2d 314 [120 Educ. L. Rep. 575] (Neb. Ct. App. 1997).

A district challenged the denial of its motion for summary judgment in a suit filed by a delivery person who was injured when she slipped and fell on a school's driveway. An appellate court in Colorado reversed in favor of the district.[33] The court contended that since the driveway did not constitute a dangerous condition of a public building, the district did not waive its immunity.

In South Carolina, a spectator unsuccessfully sued a district when she injured her ankle after stepping into a hole while attending her granddaughter's little league T-Ball game on school grounds. An appellate court agreed that the district was entitled to immunity since T-Ball qualified as a "summer sport" for the purposes of the state's recreational use statute.[34]

Other Defenses

Comparative Negligence

A student was injured when he fell from a balcony that overlooked a school swimming pool. His parents brought a negligence action against the district and the pupils who encouraged him to climb on the balcony to jump into the pool. After one of the students settled, an appellate court in Texas affirmed a jury's apportionment of fault that the school was seventy percent liable while the injured student was thirty percent negligent.[35] The court asserted that the student's willful conduct did not absolve the school of liability as the risk that the student faced was foreseeable.

Notice of Claim

The requirement that an injured party file a timely notice of claim is designed to provide defendants with an opportunity to investigate a complaint while the facts surrounding it are still recent. Even so, courts granted injured parties extensions to file late notices of claim in the first four of the seven reported cases.

The parents of a child who died as a result of a severe asthma attack when school officials ignored her pleas for help appealed a grant of summary judgment in favor of the district. The Supreme Court of Oklahoma reversed in favor of the parents.[36] The court reasoned that the parents substantially complied with the notice requirements of the state's Governmental Torts Claim Act in their capacity as parents and heirs even though they were appointed personal representatives after the statute of limitations on the claim had run.

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[33] Stanley v. Adams County Sch. Dist., 942 P.2d 1322 [120 Educ. L. Rep. 818] (Colo. Ct. App. 1997).

[34] Brooks v. Northwood Little League, 489 S.E.2d 647 [120 Educ. L. Rep. 838] (S.C. Ct. App. 1997).

[35] University Preparatory Sch. v. Huitt, 941 S.W.2d 177 [117 Educ. L. Rep. 367] (Tex. Ct. App. 1996).

[36] Calvert v. Tulsa Pub. Schs. Indep. Sch. Dist. No. 1, 932 P.2d 1087 [116 Educ. L. Rep. 815] (Okla. 1996).

A student who went into a seven-year period of self-destructive behavior and mental breakdowns after being sexually assaulted by two instructors at a school for the arts challenged a grant of summary judgment in favor of the defendants. An appellate court in North Carolina reversed in favor of the student.[47] The court maintained that since the student's incompetence was due to her mental illness, she was entitled to file a late notice of claim.

When two former high school students were sexually abused by a male teacher, only one of them reported the incident to a school social worker at the time it occurred. The teacher resigned and faced criminal prosecution. After a trial court granted both of the students' motions to file late notice of claim, the district sought further review. An appellate court affirmed that even though there did not appear to be a reasonable excuse for the delay, the district would not have been prejudiced by the late filing since it had knowledge of the essential facts underlying the claims.[48]

In a second case from New York, an appellate court permitted a motorcyclist who was injured in a collision with a school bus to serve a late notice of claim on the district. The court stated that the statute of limitations with respect to suits against educational entities did not apply to the action against the driver in his capacity as an employee of the district.[49]

A mother unsuccessfully filed child molestation charges in January 1993 against the substitute teacher who fondled her daughter in November, 1991. On further review, an appellate court in Louisiana affirmed in favor of the teacher.[50] The court reflected that since the prescriptive period began to run on the date that the mother knew all of the elements of her cause of action, she failed to file the petition in a timely manner.

Where a middle school student was injured after being pushed into a locker by a fellow student, her parents unsuccessfully filed a negligent supervision claim against the district two and one-half years later. An appellate court in New York affirmed the denial of the parents' motion to file a late notice of claim because there was no evidence school officials had been made aware of the assertion that she was pushed intentionally or that they resulted from inadequate supervision.[51] The court added that since there was no reason why the student's infancy should have contributed to the lengthy delay in filing suit, her claim was properly denied.

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[47] Soderlund v. North Carolina Sch. of the Arts, 481 S.E.2d 336 [116 Educ. L. Rep. 452] (N.C. Ct. App. 1997).

[48] Kelli "A" v. Galway Cent. Sch. Dist., 660 N.Y.S.2d 228 [119 Educ. L. Rep. 1120] (N.Y. App. Div. 1997).

[49] Dieguez v. Monticello Cent. Sch. Dist., 658 N.Y.S.2d 764 [119 Educ. L. Rep. 218] (N.Y. App. Div. 1997).

[50] Bowers v. Orleans Parish Sch. Bd., 694 So. 2d 967 [118 Educ. L. Rep. 1276] (La. Ct. App. 1997).

In a second case from New York, a child who suffered from chemical sensitivity type syndrome at school challenged the denial of her motion to serve a late notice of claim. An appellate court agreed that the suit was untimely because the ninety-day claim period began when the child began to suffer from the collection of physical symptoms upon which her claim was based, not when the ailments were definitively linked to a particular diagnosis.[52]

Educational Malpractice

A state sponsored driving school for individuals with disabilities appealed a verdict in favor of the estate of an automobile passenger who died in a collision with one of its students. The Supreme Court of Delaware reversed in favor of the school.[53] The court refused to recognize the estate's common-law third-party cause of action for educational malpractice action against the school.

Liability Insurance

Where an insurance company obtained a declaration that it was not required to defend a teacher against charges of sexual contact with a student, an appellate court in Minnesota affirmed in its favor. In examining the teacher's duties, the court concluded that since the phrase "while performing" was broader than "while acting within the scope of his duties," the company was not required to defend her against charges of intentional and unlawful sexual attacks even if some of the acts occurred on school grounds during class hours.[54]

Employee Injuries

A custodian who was injured when the cafeteria table he was moving fell on him sued the manufacturer. The manufacturer unsuccessfully brought a third-party action against the school district.[55] An appellate court in New York affirmed the dismissal of the complaint against the district. The court was of the opinion the district was not liable based on the theories of failure to train or to warn or to provide a hazard free work area.

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[51] Messere v. Fink, 658 N.Y.S.2d 508 [118 Educ. L. Rep. 1093] (N.Y. App. Div. 1997).

[52] Krogmann v. Glens Falls City Sch. Dist., 661 N.Y.S.2d 82 [120 Educ. L. Rep. 549] (N.Y. App. Div. 1997).

[53] Moss Rehab v. White, 692 A.2d 902 [118 Educ. L. Rep. 353] (Del. 1997).

[54] Minnesota Sch. Bd. Ass'n Ins. Trust v. Dahl, 566 N.W.2d 374 [119 Educ. L. Rep. 1185] (Minn. Ct. App. 1997).

Workers' Compensation

A state Industrial Commission appealed an order directing it to extend permanent total disability compensation benefits to a school counselor. The Supreme Court of Ohio reversed in favor of the Commission.[56] The court held that the Commission did not abuse its discretion in determining that the counselor's educational background could provide transferable skills based on the report of a vocational expert.

The Supreme Court of Hawaii posited that the stress-related injury a teacher suffered after she was punished for violating the school board's policy against corporal punishment was covered by state's worker's compensation law.[57] In reviewing other state laws that expressly excluded stress claims, the court thought that, regardless of their expense, stress-related injuries would be a cost of doing business in Hawaii unless specifically excluded by statute.

A district appealed an Industrial Commission's calculation of worker's compensation benefits payable to a school cafeteria worker who was totally disabled due to an on-the-job injury. The Supreme Court of North Carolina reversed in favor of the district.[58] According to the court, the Commission improperly contravened its fact finding authority when it recalculated the worker's average weekly wage.

In Nebraska, a school employee who was hurt by falling tiles challenged an order upholding a reduction in his disability rating where a series of work-related accidents exacerbated a previous back injury for which he had been compensated. An appellate court reversed in favor of the employee.[59] The court indicated that case law did not prevent the reconsideration of a doctor's report and an accepted vocational rehabilitation report to calculate which portion of the disability was due to a series of accidents.

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[55] Stephen v. Sico Inc., 654 N.Y.S.2d 449 [116 Educ. L. Rep. 762] (N.Y. App. Div. 1997).

[56] State *ex rel.* Allen v. Cleveland Bd. of Educ., 680 N.E.2d 978 [119 Educ. L. Rep. 226] (Ohio 1997).

[57] Mitchell v. State of Hawaii Dept. of Educ., 942 P.2d 514 [120 Educ. L. Rep. 591] (Hawaii 1997).

[58] McAninch v. Buncombe County Schs., 489 S.E.2d 375 [120 Educ. L. Rep. 832] (N.C. 1997).

[59] Cummings v. Omaha Pub. Schs., 558 N.W.2d 601 [115 Educ. L. Rep. 1041] Neb. Ct. App. 1997).

Where a teacher was injured in a car accident while en route to a school-sponsored conference, her insurance company joined her unsuccessful attempt to obtain workers' compensation benefits. In affirming the denial of the teacher's claim, an appellate court in Michigan agreed that her injuries were not incident to her employment.[60] The court pointed out that even if it accepted the teacher's argument that her presence at the conference was the equivalent of being at work, she was not entitled to compensation since she was injured on the way to the meeting.

Employees of a plumbing contractor unsuccessfully sued their employer and a board alleging they were exposed to a toxic substances while working at a school. An appellate court in Louisiana affirmed that since the contractor did not intentionally expose employees to toxic substances, it could not be brought under the intentional acts exception of the exclusivity provision.[61] The court added that the board was not subject to liability for workers' compensation because it was not the statutory employer of the workers.

While on vacation, a school employee injured her back when she slipped and fell on the stairs at the district office as she went to pick up her paycheck, as required by board policy. After the Workers' Compensation Board confirmed that the employee had a compensable injury, the district sought further review. An appellate court in New York affirmed.[62] The court agreed that since the worker was following district policy in picking up her check, her injury arose out of and in the course of her employment.

A school cafeteria worker who was injured while on paid leave for union activities challenged the denial of her request for compensation benefits. An appellate court in Washington reversed.[63] The court decided that since worker is defined broadly as every person engaged in the employment of an employer, she was a district worker regardless of whether she was engaged in her normal daily activities.

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[60] Camburn v. Northwest Sch. Dist., 559 N.W.2d 370 [116 Educ. L. Rep. 375] (Mich. Ct. App. 1997).

[61] Gaspard v. Orleans Parish Sch. Bd., 688 So.2d 1298 [116 Educ. L. Rep. 1285] (La. Ct. App. 1997).

[62] Berry v. New York City Bd. of Educ., 657 N.Y.S.2d 786 [118 Educ. L. Rep. 1082] (N.Y. App. Div. 1997).

[63] Ackley-Bell v. Seattle Sch. Dist. No. 1, 940 P.2d 685 [119 Educ. L. Rep. 1199] (Wash. Ct. App. 1997).

Defamation/Intentional Infliction of Emotional Distress

A probationary music teacher whose contract was not renewed claimed that allegedly defamatory statements made by board members and administrators at the time of his dismissal violated his liberty interest in his good name. When the State Commissioner of Education refused both the teacher's appeal and request for a name-clearing hearing, he filed suit in state court. However, the board had the dispute removed to a federal trial court in New York which granted its motion for summary judgment.[64] The court observed that although the teacher alleged most of the elements necessary to maintain an action for the deprivation of a constitutionally protected liberty interest, he failed to produce evidence that he had a hard time finding a job or that his difficulty in procuring employment was caused by the board's action.

In a second case from New York, a mother sought further review of the dismissal of her suit against a school district for intentional infliction of emotional distress to recover for AIDS phobia after her son discovered a hypodermic needle in a toy box in a classroom. An appellate court agreed that the claim was without merit since there was no evidence that the child was injured and tests failed to establish the actual or probable presence of HIV.[65]

A retired school superintendent challenged the dismissal of his defamation suit against school board members and his successor for allegedly falsely implying that his administration failed to make required payments to the teacher's retirement system. An appellate court in Georgia affirmed that the case was without merit since the former superintendent, who was a public figure, was unable to show that the defendants acted with actual malice.[66]

In Louisiana, a high school senior who was not allowed to graduate with her class because she was academically ineligible unsuccessfully sued the board, the principal, and two teachers for intentional and negligent infliction of emotional distress. An appellate court affirmed in favor of the defendants.[67] The court found that the teachers did not act in an extreme and outrageous manner when they refused to accept makeup work that the student submitted in May that was designed to make up for assignments that she missed between January and April.

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[64] Federico v. Board of Educ. of the Pub. Schs. of the Tarrytowns, 955 F. Supp. 194 [116 Educ. L. Rep. 969] (S.D.N.Y. 1997).

[65] Blair v. Elwood Union Free Pub. Schs., 656 N.Y.S.2d 52 [117 Educ. L. Rep. 707] (N.Y. App. Div. 1997).

[66] Purvis v. Ballantine, 487 S.E.2d 14 [119 Educ. L. Rep. 709] (Ga. Ct. App. 1997).

[67] Barrino v. East Baton Rouge Parish Sch. Bd., 697 So.2d 27 [119 Educ. L. Rep. 1280] (La. Ct. App. 1997).

Constitutional Torts

Once again, many of the cases in this section involved sexual abuse actions on behalf of students that frequently implicated student rights under title IX.

Student Initiated Cases

In the first of three cases from Texas, after a teacher sexually molested a student in the child's home, his mother sought further review of a grant of summary judgment in her suit against the school district and a variety of educators. The Fifth Circuit affirmed on the ground that insofar as the molestation took place away from school, the district and its administrators were not liable because the teacher was not acting under color of state law.[68]

A school district in Texas challenged an award of compensatory damages in favor of a student based on its failure to prevent the teacher of an after-school karate class from committing sexual abuse. The Fifth Circuit reversed and remanded.[69] The court ruled that the district was not liable under title IX since there was no proof that a school official with a duty to supervise the teacher and the power to end such abuse was aware of the sexual abuse but failed to take immediate and appropriate steps to remedy the situation.

In Texas, a district appealed the denial of its motion to dismiss a suit filed on behalf of a thirteen-year-old girl who was raped and assaulted by a custodian in a classroom after school. Even though the custodian had a criminal record, the district failed to perform a background check on the custodian. The Fifth Circuit reversed in favor of the district.[70] The court acknowledged that compulsory attendance laws did not create a special relationship requiring school officials to protect students from private actors. The court added that the child's parents did not demonstrate that school officials placed the child in a dangerous situation and that the district's failure to check the custodian's background was not the nexus between the rape and assault that would have been necessary to establish its liability for the child's injuries.

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[68] Becerra v. Asher, 105 F.3d 1042 [115 Educ. L. Rep. 638] (5th Cir. 1997).

[69] Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 [116 Educ. L. Rep. 64] (5th Cir. 1997). *See also* Piwonka v. Tidehaven Indep. Sch. Dist., 961 [118 Educ. L. Rep. 283] (S.D. Tex. 1997) where a student failed to state Title IX or section 1983 claims.

[70] Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412 [118 Educ. L. Rep. 834] (5th Cir. 1997).

A student who was sexually abused by a high school teacher over a two-year period did not report it to anyone. However, when two of the student's aunts learned of the abuse, the teacher pleaded guilty to one count of statutory rape. Subsequently, the student filed claims for violations of her civil rights action under section 1983 and sexual harassment under title IX.[71] A federal district court in Tennessee dismissed the section 1983 claims since the student failed to demonstrate that school officials were deliberately indifferent to her right of bodily integrity and the title IX claim because title VII agency principles were inapplicable. On further review, Sixth Circuit affirmed with regard to section 1983 but reversed on title IX. The court remanded for the application of title VII standards to the sexual harassment claim.

Where a former student in Indiana filed a sexual discrimination suit under title IX against the teacher with whom she had had an affair and a variety of school officials, the district appealed the denial of its motion for summary judgment. The Seventh Circuit reversed in favor of the principal and assistant principal on the ground that they were not proper defendants under title IX.[72] In addition, the court was of the view that title IX did not support liability based on negligence or strict liability as the proper standard was whether the board had actual knowledge of discrimination but failed to act.

Acting on behalf of her daughter, a mother in Georgia sued a school board and two officials for failing to prevent her daughter from being sexually harassed by another student. After a federal trial court dismissed the suit for failure to state a claim upon which relief could be granted, the Eleventh Circuit affirmed.[73] Upon a rehearing, the court contended that title IX did not impose liability against the board due to its failure to remedy a known hostile environment caused by student-to-student sexual harassment.[74]

In the first of two cases from Florida, the father of a fourteen-year-old who was robbed and killed as he waited for a ride home after a school sponsored event appealed the dismissal of his section 1983 action against the district. The father claimed that the board and principal deprived the student of rights, privileges, and immunities guaranteed by the Due Process Clause of the Fourteenth Amendment. The Eleventh Circuit affirmed that nothing in the Fourteenth Amendment required the board to protect the student's life, liberty, and property from the actions of other persons. Further, the court asserted that the board neither created a special danger or special relationship that would render it liable.

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[71] Doe v. Claiborne County, Tenn., 103 F.3d 495 [115 Educ. L. Rep. 265] (6th Cir. 1996).

[72] Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 [122 Educ. L. Rep. 48] (7th Cir. 1997). *But see* Does v. Covington County Sch. Bd., 969 F. Supp. 1264 [120 Educ. L. Rep. 486] (M.D. Ala. 1997) where actual notice of potential sexual abuse by a teacher was sufficient to impose liability under Title IX.

[73] Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 [106 Educ. L. Rep. 486] (11th Cir.), *opinion vacated*, 91 F.3d 1418 [111 Educ. L. Rep. 1107] (11th Cir. 1996) (en banc).

[74] Davis v. Monroe County Bd. of. Educ., 120 F.3d 1390 [120 Educ. L. Rep. 390] (11th Cir. 1997).

Where a student in Florida committed suicide at home after twice attempting to do so at school, his mother brought a section 1983 action against the board and others alleging that their failure to train staff in suicide intervention/prevention constituted deliberate indifference to her son's rights. The Eleventh Circuit stated that the board did not have an affirmative constitutional duty to protect the student from harming himself. However, the court maintained that the board assumed a duty of care based on the mother's allegation that a third party informed the school of one of the student's suicide attempts and that an administrator said he would take care of the situation. As such, the court upheld the finding that the board was thirty-three percent at fault.

A federal trial court in Tennessee denied a county's motion for summary judgment in a section 1983 claim filed on behalf of former students who were isolated in small supply rooms as punishment for leaving their high school without permission. The court noted that summary judgment was inappropriate since there were material issues of fact regarding whether the students received minimal due process prior to punishment, whether they had the opportunity to use the restroom, whether they were told to bring lunches on the day they were placed in isolation, and whether board policies and customs were the moving force behind the alleged due process violations.

Following a jury verdict in favor of the defendants, a federal district court in New York denied a former student's request for a new trial in her suit which claimed that she was sexually harassed by her peers. The court reasoned that limitations on terminology in describing the school's failure to take appropriate remedial steps did not influence the result of the trial, witnesses did not have to be sequestered, and the presence of a teacher and the superintendent at a hearing did not create a coercive atmosphere that caused witnesses to testify falsely.

A student and her father sought reconsideration of the partial dismissal of her claim that school officials failed to stop sexual harassment by her peers. Relying on the principle that reconsideration is permissible when there is a change in the law, a federal trial court in California cited several

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Mitchell v. Duval County Sch. Bd., 107 F.3d 837 [116 Educ. L. Rep. 56] (11th Cir. 1997).

Wyke v. Polk County Sch. Bd., 129 F.3d 560 [122 Educ. L. Rep. 118] (11th Cir. 1997).

Orange v. County of Grundy, 950 F. Supp. 1365 [115 Educ. L. Rep.938] (E.D. Tenn. 1996).

Bruneau v. South Kortright Cent. Sch., 962 F. Supp. 301 [118 Educ. L. Rep. 892] (N.D.N.Y. 1997).

new cases on school liability under title IX for student-on-student harassment in granting their motion.[79]

In the first of two cases from Pennsylvania, a female student sued her school district and various educators alleging that she was sexually harassed even after she made numerous complaints to administrators. Following title VII as the most appropriate analogue for defining title IX's substantive standards, a federal trial court permitted the title IX claim to proceed based on the charge that officials failed to prevent or eradicate a hostile environment that discriminated and limited educational opportunities based on sex.[80] However, in noting that such a claim can only be brought against a district, not individual defendants, the court held that punitive damages are unavailable under federal law. The court dismissed the student's section 1983 claim because the theory of state-created danger was inapplicable and the alleged nonfeasance did not violate her right to due process. The court also rejected the state law tort claims, which came under its supplemental jurisdiction, because they could not be pursued against the district or its employees.

A student sued the school district under title IX and section 1983 after a teacher referred to her as a Neo Nazi during the first day of a geography class and peers started calling her a Nazi. The student's parents claimed that the name calling was a daily activity and complained that school officials had not taken remedial action. A federal district court in Pennsylvania dismissed the title IX claim since any discrimination that the student suffered did not stem from her sex.[81] Further, the court determined that the school was not at fault because it did not have a policy, practice, or custom of providing a basis for the insults and that the teacher's comments did not constitute discrimination based on national origin. Finally, the court offered that the district was not liable under section 1983 for the students' comments.

A student who was expelled for possessing a handgun on school property unsuccessfully filed a section 1983 suit alleging violations of his Fourth, Fifth, and Sixth Amendments rights. The federal district court in Kansas decreed that there was no basis for claims against the superintendent or police chief due to constructive knowledge of the alleged violation.[82] Additionally, the court indicated that the student failed to state a claim against the police officer who initiated the search but had no involvement in his expulsion or the principal who was present but did not participate in the search.

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[79] Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415 [115 Educ. L. Rep. 854] (N.D. Cal. 1996).

[80] Collier by Collier v. William Penn Sch. Dist., 956 F. Supp. 1209 [117 Educ. L. Rep. 173] (E.D. Pa. 1997).

[81] Nicole K., by & through Peter K. v. Upper Perkiomen Sch. Dist., 964 F. Supp. 931 [118 Educ. L. Rep. 1025] (E.D. Pa. 1997).

[82] James by and through James v. Unified Sch. Dist. No. 512, 959 F. Supp. 1407 [118 Educ. L. Rep. 161] (D. Kan. 1997).

Employee Initiated Cases

A teacher and her husband sued state officials, government entities, and others for alleged constitutional and civil rights violations based on conspiracies to drive them out of business and deprive them of their rights. The teacher also brought a section 1983 action against the superintendent for alleged sexual assaults and harassment. After granting motions for summary judgment in favor of all of the defendants except the superintendent, a federal trial court in Wisconsin dismissed the claims against him.[83] On appeal, the Seventh Circuit affirmed in favor of all of the defendants except the superintendent. The court agreed that the teacher established a substantive due process claim against the superintendent in light of her liberty interest in bodily integrity since he threatened to take adverse employment action against her if she refused his sexual advances.

In Virginia, a female school psychologist successfully filed suit against the Commonwealth for creating a hostile work environment and quid pro quo sexual harassment.[84] The court found that the psychologist satisfied the legal requirements under both of her claims because she was subject to unwelcomed conduct based on her sex, it was so pervasive that it altered her conditions of employment, and her employer knew or should have known of the situation. As such, the court ruled that the psychologist was entitled to compensatory damages under the Civil Rights Act of 1991.

Conclusion

Whether the slight decline in the number of cases reported this year is a trend remains to be seen. School districts continued to have success in advancing the defense of sovereign immunity while the number of cases involving sexual abuse and assault continues to increase.

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[83] Wudtke v. Davel, 128 F.3d. 1057 [122 Educ. L. Rep. 85] (7th Cir. 1997). *See* Lopez v. San Luis Valley, Bd. of Coop. Educ. Servs., 977 F. Supp. 1422 [122 Educ. L. Rep. 137] (D. Colo. 1997) (where a principal could not maintain an action since she was not an employee of a program operated by the defendant).

[84] Reinhold v. Commonwealth, 947 F. Supp. 919 [115 Educ. L. Rep. 666] (E.D. Va. 1996).

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SPORTS

Linda A. Sharp

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Introduction

This chapter includes cases in K-12 and higher education dealing with student-athletes and coaches as well as athletic directors, facilities, and associations. The chapter does not discuss litigation pertaining to the instruction of physical education.

Eligibility

This section contains fourteen cases: one challenges longevity rules; three concern age; two discuss core course requirements; one relates to disciplinary sanctions; three review the right of nonenrolled students to participate in athletics; two address the classification of schools for athletic competition; one case concerns drug testing of athletes; and one deals with the National Collegiate Athletic Association's (NCAA) Postbaccalaureate Bylaw.

Longevity

In Michigan, an athletic association had an eight-semester eligibility rule. Under such a rule, a student who has completed eight semesters of high school is ineligible for interscholastic sports competition. A student with academic problems who repeated eleventh grade due to poor grades, but who was diagnosed with attention deficit hyperactivity disorder at the beginning of his ninth semester in high school, challenged the eight-semester rule. The association denied the student's request for a waiver that would have permitted him to play basketball. Based on the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, a federal trial court issued a preliminary injunction that allowed the student to play during his senior year. However, the Sixth Circuit vacated and reversed in acknowledging that the eight-semester rule did not violate either the ADA or Section 504.[1] The court asserted that waiving the rule would have fundamentally altered the state's high school sports programs. Further, the court ascertained that a waiver would have put a huge administrative and financial burden on the athletic association to make "near-impossible determinations" about a student's physical and athletic maturity.

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[1] McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453 [120 Educ. L. Rep. 96] (6th Cir. 1997).

Age

The first of three cases dealing with age restrictions and high school athletes arose in Missouri. Where a nineteen-year-old baseball player was not allowed to play in his senior year because he violated the age rule of his high school activities association, a federal trial court granted the student's request for a preliminary injunction to permit him to participate as he pursued claims under the ADA and Section 504. On appeal, the Eighth Circuit reversed. On remand, the trial court granted the student's post-dismissal motion for attorney fees and expenses. Subsequently, the Eighth Circuit reversed the award of attorney fees since the student was not the prevailing party.[2] The court concluded that the student did not qualify as the prevailing party where the only basis for his claim of success on the merits was a judgment that was reversed as a nullity.

In Florida, a federal trial court relied on the ADA and Section 504 in granting an injunction to a student who was declared ineligible to participate in football and wrestling because he turned nineteen prior to the start of the school year. On appeal, the Eleventh Circuit vacated the judgment as moot.[3] The court decided that since the student completed his athletic participation in high school, the "capable of repetition yet avoiding review" exception to mootness was inapplicable.

A student who was diagnosed as having attention deficit disorder in his freshman year enjoined the enforcement of a rule that would have prevented his participation in wrestling and football during his senior year because he had turned nineteen prior to the start of the academic year. The Supreme Court of Montana reversed on the ground that the student was unable to show the likelihood of success on the merits of his Section 504 claim.[4] The court contended that the student would not have suffered irreparable injury if he had not been allowed to participate since he did not have a federally protected right to participate in interscholastic sports.

Core Courses

In the first of two cases discussing the NCAA core courses requirement, the federal district court in Connecticut granted a preliminary injunction to a university freshman which allowed him to participate in intercollegiate basketball and to receive athletic financial assistance even though he had been designated as a nonqualifier.[5] The court found that the NCAA Initial-Eligibility Clearinghouse improperly overruled a high school principal's judgment that the student met the core requirement since his mathematics classes should have been valued at .5 credits each instead of .33 credits. On appeal, the Second Circuit remanded but left the injunction intact.[6] The panel held that the trial court incorrectly interpreted state law since the NCAA's arbitrary refusal to grant the student a waiver breached the duty of fair dealing which is implied in every contract. According to the court, state law required more than arbitrary action before it could be considered bad faith.

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[2] Pottgen v. Missouri State High Sch. Athletic Ass'n, 103 F.3d 720 [115 Educ. L. Rep. 297] (8th Cir. 1997).

[3] Johnson v. Florida High Sch. Activities Ass'n, 102 F.3d 1172 [117 Educ. L. Rep. 40] (11th Cir. 1997).

[4] M.H. v. Montana High Sch. Ass'n, 929 P.2d 239 [115 Educ. L. Rep. 94] (Mont. 1996).

In New Jersey, a college student with a learning disability challenged the NCAA's declaration that he was a nonqualifier for athletic participation because the special education classes he took in high school did not satisfy the NCAA's requirement that the student complete thirteen core courses. Further, since the high school could not show that the special education courses were the equivalent of regular education classes, the NCAA Council Subcommittee on Initial-Eligibility Waivers did not waive the core course requirement based on its judgment that the student would have been unable to succeed academically during his first year of college if he participated in athletics. Consequently, the student, who had been promised a football scholarship, was unable to receive athletic financial aid during his freshman year or to participate in athletics. The federal district court rejected the student's request for a preliminary injunction based on his claim that the NCAA violated the ADA.[7] In so doing, the court noted that the bylaws regarding core courses allowed adequate alternative procedures for students with learning disabilities. The court added that the complete abandonment of the core course requirement was inappropriate since it would have fundamentally altered the nature of the privilege of participation in NCAA intercollegiate athletics.

Discipline

Five former and current football players in Washington appealed a grant of summary judgment in their suit against their athletic conference which claimed that it violated the Sherman Act and committed a breach of contract by imposing harsh sanctions on the university for rules violations. The Ninth Circuit affirmed that the athletes failed to support their argument that the penalties were grossly disproportionate to the university's violations.[8] As to the breach of contract claim, the court observed that athletes cannot be considered third-party beneficiaries of the pact between the conference and its university members since they were unable to establish that the parties intended to create direct legal obligations between themselves and students.

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[5] Phillip v. National Collegiate Athletic Ass'n, 960 F. Supp. 552 [118 Educ. L. Rep. 208] (D. Conn. 1997).

[6] Phillip v. Fairfield Univ., 118 F.3d 131 [119 Educ. L. Rep. 798] (2d Cir. 1997).

[7] Bowers v. National Collegiate Athletic Ass'n, 974 F. Supp. 459 [121 Educ. L. Rep. 154] (D. N.J. 1997).

Right of Nonenrolled Student to Participate

In the first of three cases dealing with whether students who are not enrolled in public schools have a right to participate in a district's interscholastic sports programs, a pupil in a private school appealed the dissolution of a preliminary injunction that would have allowed her to play volleyball since her school did not have a program. The Supreme Court of Montana affirmed.[9] Using middle-tier constitutional analysis, the court was of the opinion that the district's policy restricting sports participation to its own students as a means of effectively integrating academics and extracurricular activities outweighed the pupil's right to take part in its sports program.

Students in a private school sought to compel a public school district to permit them to participate in its sports program. The federal trial court in Hawaii granted the district's motion for summary judgment.[10] The court determined that the district's interest in developing the full academic potential of each student through an integrated program of academic courses, elective classes, and extracurricular activities outweighed the students' rights to participate in only one part of the program.

The mother of a child who was home schooled challenged a district's denial of her request to permit her daughter to participate in its interscholastic sports programs because she was not regularly enrolled in classes. An appellate court in New York affirmed a grant of summary judgment in favor of the district on the basis that the child had no due process rights since sports participation is merely an expectation that does not give rise to a fundamental right.[11] Turning to the mother's equal protection claim, the court used the rational relationship test in declaring that the district's justifications for the enrollment requirement, including the promotion of school spirit and loyalty, were plausible.

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[8] Hairston v. Pacific 10 Conference, 101 F.3d 1315 [114 Educ. L. Rep. 771] (9th Cir. 1996).

[9] Kaptein v. Conrad Sch. Dist., 931 P.2d 1311 [116 Educ. L. Rep. 435] (Mont. 1997).

[10] Office of Hawaiian Affairs v. Department of Educ., 951 F. Supp. 1484 [116 Educ. L. Rep. 229] (D. Hawaii 1996).

[11] Bradstreet v. Sobol, 650 N.Y.S.2d 402 [114 Educ. L. Rep. 927] (N.Y. App. Div. 1996).

Classifications of Schools

An athletic league which had been organized to supervise interscholastic competition appealed a judgment in favor of a school which alleged that it violated its bylaws in the way it calculated enrollment. The school had argued that the league placed it at a competitive disadvantage by reclassifying it with larger schools. The Supreme Court of Virginia affirmed that the league arbitrarily and capriciously violated its own bylaws in reclassifying the school.[12]

In Wisconsin, the state interscholastic athletic association sought further review of a temporary injunction awarded to a school district that would have prevented the district being reassigned to a new conference. The district claimed that this was not a reasonable alignment that it was entitled to under the group's bylaws. An appellate court reversed in favor of the association.[13] The court pointed out that the district could not maintain a breach of contract claim because the association, through its bylaws, retained almost complete discretion to decide issues of conference alignment. The court added that conference membership, although important, is not a contractual right that gives rise to a legal remedy.

Drug Testing

A university challenged a preliminary injunction entered on behalf of a football player who was suspended after a test conducted by the NCAA indicated that he used the anabolic steroid testosterone. An appellate panel in Louisiana reversed in favor of the university on the ground that the trial judge erred in ruling that the drug tests were flawed since the judge relied on expert testimony that did not support his own conclusions.[14] Also, the court stated that the athlete's diminished expectation of privacy was outweighed by the interests of the NCAA and the university in safeguarding the integrity of intercollegiate athletic competition while protecting the health and safety of participants. As to the athlete's due process claim, the court reasoned that insofar as participation in intercollegiate athletics is a privilege, not a property right, it is not protected by constitutional due process safeguards.

Postbaccalaureate Bylaw

A student challenged the NCAA's Postbaccalaureate bylaw under which an athlete may not participate in intercollegiate sports at a postgraduate institution other than the one from which he or she obtained an undergraduate degree. The student wished to continue playing volleyball while she completed her graduate study at other schools because her alma mater did not have programs in her graduate field of study. A federal trial court in Pennsylvania granted the NCAA's motion to dismiss the student's allegations.[15] The court decreed that the Sherman Act is inapplicable to NCAA activities that do not pertain to the its commercial ventures and that the eligibility regulation was not covered by antitrust law. The court further indicated that the NCAA is not subject to title IX since it is not a recipient of federal funds. Finally, the court declined to exercise supplemental jurisdiction over the state law contract claim.

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[12] Virginia High Sch. League v. J.J. Kelly High Sch., 493 S.E.2d 362 [122 Educ. L. Rep 536] (Va. 1997).

[13] School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n, 563 N.W.2d 585 [118 Educ. L. Rep. 762] (Wis. Ct. App. 1997).

[14] Brennan v. Board of Trustees for Univ. of La. Sys., 691 So. 2d 324 [117 Educ. L. Rep. 803] (La. Ct. App. 1997).

Equality of Programs

Gender

A student who was recruited to play volleyball was promised, but never received, a scholarship due to a lack of funds for the program. As such, the student filed a title IX action against the university alleging not only that the funds for women's sports were not allocated on a gender-equitable basis but also that other facets of the program, including medical care, were not comparable to what was available to men. A federal district court in Alabama posited that since the student's claims fell within the continuing violation doctrine, they were timely.[16] The court further reflected that the student was qualified to seek class certification even though her athletic eligibility had expired.

The first of three title IX actions wherein students sought damages for intentional gender-based discrimination over sexual abuse/harassment involved a high school student from Texas who had a sexual relationship with a karate instructor hired by her district. After a jury awarded substantial compensatory damages to the student based on her claim that the district was negligent in its failure to prevent the karate instructor from committing sexual abuse, it sought further review. The Fifth Circuit reversed as it held that the district could not be liable under title IX for sexual harassment perpetrated by teachers against students since it did not have actual knowledge that the pupil faced a substantial threat of sexual harassment.[17] Under the actual knowledge standard, the court suggested that the district could only be liable for damages caused by its intentional acts of discrimination.

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[15] Smith v. National Collegiate Athletic Ass'n, 978 F. Supp. 213 [122 Educ. L. Rep. 171] (W.D. Pa. 1997).

[16] Beasley v. Alabama State Univ., 966 F. Supp. 1117 [119 Educ. L. Rep. 400] (M.D. Ala. 1997).

[17] Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 [116 Educ. L. Rep. 64] (5th Cir. 1997).

In Tennessee, a high school student who alleged that she was sexually abused and harassed by a baseball coach unsuccessfully filed federal civil rights and title IX charges against the board of education and other defendants. On further review, the Sixth Circuit affirmed the dismissal of all of the student's complaints other than the title IX claim.[18] Reversing in favor of the student on her title IX allegation, the court adopted the agency principles applicable to title VII sexual harassment claims.

A high school student sued her district under title IX and section 1983 alleging that the district had a policy of deliberate or reckless indifference which allowed her to be sexually abused by a wrestling coach/physical education instructor. The student charged that since the coach engaged in sexual conduct with other students, the district knew or should have known of the his prior conduct but failed to protect students from the coach's behavior. A federal trial court in Pennsylvania rejected the district's motion for summary judgment because there were material issues of fact as to whether the alleged policy of indifference continued into the statute of limitations period.[19] As to title IX, the court adopted agency principles to impute potential liability to the district for the coach's intentional acts of discrimination.

Torts

The first three of this year's thirty-one tort cases examining sports dealt with intentional torts. Twenty-six of the twenty-eight negligence cases concerned participants while two dealt with spectators.

Intentional

Assault and Battery

Where a junior high school student in Illinois who managed the wrestling team was sexually assaulted by the coach at the coach's home, she and her mother sued him and the district for negligent hiring and supervision. The plaintiffs further alleged a negligence per se claim predicated on the school's failure to meet its statutory duty to conduct a background check on the coach. After a trial court granted the district's motion to dismiss, an appellate tribunal affirmed.[20] The court agreed that the claims of negligent hiring and supervision were properly dismissed without prejudice because the student and her mother failed to assert that the alleged negligence was the proximate cause of her injuries. However, the court reversed and reinstated the negligence per se claim because the student and her mother sufficiently alleged the elements of their charge.

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[18] Doe v. Claiborne County, Tenn., 103 F.3d 495 [115 Educ. L. Rep. 265 (6th Cir. 1996).

[19] Seneway v. Canon McMillan Sch. Dist., 969 F. Supp. 325 [120 Educ. L. Rep. 168] (W.D. Pa. 1997).

Defamation

A former assistant football coach sued his university, the head coach, and the school's fan magazine for defamation over comments made by the head coach. The sixty-four-year-old assistant, who coached for eight years, was not offered a new contract after the head coach allegedly said that the assistant "could only coach one or two more years" and that the assistant's age prevented him from putting in the long hours that were necessary. Additionally, the head coach supposedly said that the assistant had long ago abandoned his "all for one, one for all" approach. A federal trial court in Indiana granted the defendants' motion to dismiss.[21] The court maintained that the head coach's remarks were not defamatory per se and that there was no showing of actual malice by the university that would have supported a defamation per quod claim. The court also judged that the assistant coach's allegation that he was unlikely to obtain a comparable position was insufficient to show special damages as part of his defamation per quod claim because he did not actually incur pecuniary damages.

Wrongful Arrest

A man who was arrested by a university police officer while trying to sell tickets to a basketball game outside of an arena sued the police department for wrongful arrest. After a trial court denied the department's motion to dismiss, an appellate court in North Carolina affirmed.[22] The court agreed that the officer lacked probable cause to arrest the man since the solicitation to sell tickets, in and of itself, was not a crime under any statute or ordinance. In addition, the court asserted that since the officer had no knowledge of the price that the man was asking for the tickets, the scalping statute could not have been invoked as a reason for his arrest.

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[20] Mueller v. Community Consol. Sch. Dist. 54, 678 N.E.2d 660 [117 Educ. L. Rep. 698] (Ill. App. Ct. 1997).

[21] Moore v. University of Notre Dame, 968 F. Supp. 1330 [119 Educ. L. Rep. 935] (N.D. Ind. 1997).

[22] Roberts v. Swain, 487 S.E.2d 760 [119 Educ. L. Rep. 1224] (N.C. Ct. App. 1997).

Negligence

Participants

The first four negligence cases dealt with the underlying question of the duty of care. A former college basketball player who suffered knee injuries sued the college, his coach, and the athletic trainer. The player alleged that the coach was negligent in allowing him to play despite his knee injuries and that the trainer was at fault for permitting him to participate despite medical evidence to the contrary. After a trial court granted the defendants' motion for summary judgment, the player appealed. The Supreme Judicial Court of Maine reversed on the basis that the coach and trainer owed the player a duty of reasonable care.[23] The court decreed that the player did not have to present expert testimony to establish the standard of care applicable to the trainer over the claim that he failed to advise the coach properly as to the extent of his injury.

In Texas, a preparatory school sought further review of a judgment in favor of parents whose son was injured when he tried to jump from a balcony into a swimming pool. An appellate court disagreed with the school's argument that it did not owe the student any more duty than to a trespasser; the court found that the student was injured at school, during class hours, and during a time when the district accepted responsibility for his supervision. As such the court affirmed that the school was at fault because it was foreseeable that a student would attempt to jump from the balcony into the pool.[24]

A district challenged a verdict in favor of a high school volleyball player whose coach was not present when he injured his spine and was paralyzed from the waist down. The student was hurt when he attempted a gymnastic dive over a partially raised net as he was helping to set up equipment before practice. An appellate court in New York reversed in favor of the district.[25] The court found that the district did not have a duty to protect the student from the consequences of his own independent and ill-advised acts that were unrelated to the sport he was participating in since he created the peril and assumed the risk of his conduct. The court added that leaving high school aged athletes unattended under the circumstance did not constitute an unassumed, concealed, or unreasonably increased risk of harm from a sporting activity.

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[23] Searles v. Trustees of St. Joseph's College, 695 A.2d 1206 [119 Educ. L. Rep. 545] (Me. 1997).

[24] University Preparatory Sch. v. Huitt, 941 S.W.2d 177 [117 Educ. L. Rep. 367] (Tex. Ct. App. 1996).

[25] Barretto v. City of New York, 655 N.Y.S.2d 484 [117 Educ. L. Rep. 256] (N.Y. App. Div. 1997).

In a second case from New York, a student who injured his arm when he fell from a blocking sled on school grounds after school hours challenged a grant of summary judgment in favor of his district. The student had attended football practice earlier in the day but returned with friends later to work on the sleds. An appellate court affirmed that the district did not owe the student a duty of adequate supervision because he was not within the district's custody and control at the time of the accident.[26]

The first of four cases dealing with immunity involved a university gymnast from Michigan who unsuccessfully attempted to recover for injuries that he sustained while on a road trip with the team. The student injured his face and head when the coach led the team on a sledding outing and he crashed into a tree at the bottom of a slope. An appellate court affirmed a grant of summary judgment in favor of the defendants.[27] The court held that since the operation of intercollegiate athletic programs is a governmental function, the university and its officials were entitled to immunity.

A district requested further review of the denial of its motion for a summary decision in its favor in an action filed by the parents of a female student who was raped in a high school locker room during the school day by a trespasser. Although three school employees saw the stranger coming out of, or near, the locker room, no one reported this incident or took steps to have him removed from the premises because the school did not have a policy covering this type of security breach. An appellate court in Minnesota affirmed that the district's not having a security policy was not a discretionary act entitling it to immunity.[28] The court contended that the district did not allege that it chose not to adopt a security policy due to policy considerations; rather, it simply elected not to have a policy. The court emphasized that this is not the type of decision-making which should be protected by the doctrine of discretionary immunity.

In another case from Ohio which also dealt with the applicability of discretionary immunity, a high school football player injured his knee in a fall on the practice field when he stepped on an exposed sprinkler head. The player sought further review of his unsuccessful claim that his injury was caused by the board's negligence in failing to keep the sprinkler heads from becoming exposed. An appellate court reversed in favor of the student-athlete.[29] The court noted that the maintenance of a practice field does not involve the type of judgment or discretion intended to be protected by immunity statutes.

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[26] Reed v. Pawling Cent. Sch. Dist., 664 N.Y.S.2d 483 [122 Educ. L. Rep. 521] (N.Y. App. Div. 1997).

[27] Harris v. University of Mich. Bd. of Regents, 558 N.W.2d 225 [115 Educ. L. Rep. 488] (Mich. Ct. App. 1996).

[28] S.W. v. Spring Lake Park Sch. Dist. No. 16, 566 N.W.2d 366 [119 Educ. L. Rep. 1177] (Minn. Ct. App. 1997).

The mother of an eight-year-old child who was injured while playing a game of tag in a gym sought further review of the dismissal of her suit against the leaders of an after-school child care program and the district. An appellate court in Illinois reversed in favor of the mother.[30] The court declared that when one of the adult leaders actively participated in the game, he abandoned his role as supervisor and became an equal competitor who was not entitled to immunity.

In the first of three cases from New York addressing assumption of risk, a softball player who was injured when he slipped on a sewer lid on a field owned by a school district challenged an adverse grant of summary judgment. An appellate court affirmed that the player assumed the risk of injury.[31] The court observed that the player admitted seeing the sewer lid before the accident and that the player failed to produce evidence that it unreasonably increased his risk of injury.

Where a member of a rugby club broke his neck during practice, an appellate court in New York affirmed that the state university was not liable for negligent supervision. The court ascertained that as an experienced rugby player who had previously suffered from injuries in a sport where the risk of harm was apparent, the student assumed the obvious risk of injury.[32]

A high school wrestler who was injured in a take-down move by his opponent unsuccessfully filed a negligence action against the district. An appellate court affirmed that the district was not liable since the student voluntarily assumed the risk inherent in the sport of wrestling.[33] The court added that there was no evidence that the risk of injury was concealed or that the coach forced the athlete to disregard a risk of injury that he would not have otherwise assumed.

Whether a high school softball player who was injured during practice was contributorily negligent was the pivotal issue in a case from North Carolina. The player, who was hurt by a ball that took a bad bounce as the team practiced on a rough field, requested further review of a grant of summary judgment in favor of the board in her negligence action. An appellate court affirmed that although the player was an invitee to whom the board had a duty to warn, it did not have to advise her about the condition of the field since she was already aware that it was rough.[34] The court pointed out that while the coach may have been negligent in conducting the practice on the rough field, the player could not recover because she continued participating even though she appreciated the danger.

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[29] Hall v. Fort Frye Local Sch. Dist. Bd. of Educ., 676 N.E.2d 1241 [116 Educ. L. Rep. 1126] (Ohio Ct. App. 1996).

[30] Longfellow by Longfellow v. Corey, 675 N.E.2d 1386 [116 Educ. L. Rep. 744] (Ill. App. Ct. 1997).

[31] Conway v. Deer Park Union Free Sch. Dist. No. 7, 651 N.Y.S.2d 96 [115 Educ. L. Rep. 42] (N.Y. App. Div. 1996).

[32] Regan v. State, 654 N.Y.S.2d 488 [116 Educ. L. Rep. 768] (N.Y. App. Div. 1997).

[33] Walcott v. Lindenhurst Union Free Sch. Dist., 662 N.Y.S.2d 931 [121 Educ. L. Rep. 832] (N.Y. App. Div. 1997).

Gross negligence was the primary concern in a case from Georgia wherein a member of a college men's rowing team was injured during practice for a regatta when his boat was struck from behind by one operated by the women's varsity team. In fact, the incident arose because the women's team was not following the practice instructions which had been disseminated to all teams. Even though the rower signed a release form applicable to all participants in the regatta from all claims other than wilful and wanton misconduct, a jury returned a verdict in his favor. On further review, an appellate court affirmed.[35] The court agreed that the issue of gross negligence was an appropriate question for the jury.

Where a high school soccer player was injured by an opponent, he prevailed in a negligent supervision claim against the board that was responsible for the other team. On further review, an appellate court in Florida reversed in favor of the board.[36] The court ruled that there was insufficient evidence to establish that the opponent heard and acted on his coach's instruction to foul the player.

The first of four cases examining equipment issues was filed by a high school wrestler who was injured during practice when he landed on a hardwood floor rather than a protective mat. The school challenged the denial of its motion for summary judgment when the student claimed that it was negligent because the mat he was practicing on was smaller than a regulation tournament mat. An appellate court in New York reversed in favor of the school on the ground that the student assumed the foreseeable risk of being thrown to the floor.[37] The court determined that the use of the smaller mat did not represent an unassumed, concealed, or unreasonably increased risk of injury to the wrestler.

In a second case from New York, a student was injured while playing in a stickball game organized by a teacher during recess when a bat that slipped from the hands of a participant struck him in the eye. An appellate court affirmed the denial of the school district's motion for summary judgment since there was a question of fact as to whether the supervising teacher's failure to direct the students to use a protective fence unreasonably increased the risk of injury to the plaintiff.[38]

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[34] Daniel v. City of Morganton, 479 S.E.2d 263 [114 Educ. L. Rep. 1251] (N.C. Ct. App. 1997).

[35] Trustees of Trinity College v. Ferris, 491 S.E.2d 909 [121 Educ. L. Rep. 1167] (Ga. Ct. App. 1997).

[36] School Bd. of Broward County v. Beharrie, 695 So. 2d 437 [119 Educ. L. Rep. 293] (Fla. Dist. Ct. App. 1997).

[37] Egger v. St. Dominic High Sch., 657 N.Y.S.2d 85 [118 Educ. L. Rep. 430] (N.Y. App. Div. 1997).

A high school football player in Illinois who received severe and permanent head injuries alleged that his injuries occurred because the shockblocker safety system in his helmet was replaced with a static face guard. On interlocutory appeal, the court was of the opinion that the district was immunized for acts of negligence pertaining to the provision of athletic equipment to students.[39]

In Massachusetts, a university and two coaches challenged a jury verdict in favor of a pole vaulter who was seriously injured when he fell off of the back edge of a landing pit and hit his head. An appellate court affirmed in favor of the injured athlete.[40] The court agreed that the evidence supported the conclusion that the accident was reasonably foreseeable since both of the coaches knew that vaulters had been injured by second impact injuries of bouncing off the pit mattress and landing outside of the pit. The court added that the defendants were at fault because although supplemental padding was available, it was not used at the time of the accident.

The first three of the four cases addressing premises liability were from New York. A student manager of a volleyball team was injured at a road game in another district when she tripped and fell over an electrical cord that connected the scorer's box to the outlet as she retrieved a ball from under the bleachers. Subsequently, the district sought further review of the denial of its motion for summary judgment when the student sued her own district alleging that it was negligent in the maintenance and control of the premises upon which she was injured. An appellate court reversed in positing that the student's district had no control or obligation to maintain the premises at the school where she was injured.[41]

A high school softball player who was injured as she stepped into a hole by home plate alleged that the district was negligent both with regard to this defect and in exacerbating her injuries by moving her before medical personnel arrived. The district disputed the denial of its motion for summary judgment. An appellate court in New York reversed on the premises liability allegation.[42] The court indicated that the player assumed the risk of injury because she continued playing in the game even though she knew that the field was riddled with holes, including the one near home plate. Turning to the second claim, the court agreed that summary judgment was inappropriate where there was a question of fact as to whether the alleged negligence of the coach and others created additional unassumed risks which aggravated the player's injury.

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[38] Stryker v. Jericho Union Free Sch. Dist., 663 N.Y.S.2d 868 [122 Educ. L. Rep. 268] (N.Y. App. Div. 1997).

[39] McGurk v. Lincolnway Community Sch. Dist. #210, 679 N.E.2d 71 [118 Educ. L. Rep. 711] (Ill. App. Ct. 1997).

[40] Moose v. Massachusetts Institute of Technology, 683 N.E.2d 706 [120 Educ. L. Rep. 562] (Mass. App. Ct. 1997).

[41] Eisenberg v. East Meadow Union Free Sch. Dist., 657 N.Y.S.2d 434 [118 Educ. L. Rep. 720] (N.Y. App. Div. 1997).

Where a student who was trying out for his school's basketball team injured his knee when he caught his foot on a sticky substance on the gym floor, an appellate court in New York affirmed the denial of the district's motion for summary judgment.[43] According to the court, there were genuine issues of material fact as to whether school employees affirmatively created a dangerous or defective condition by not properly removing tape from the gym floor.

In Nebraska, a school district and the operator of a recreational camp sought further review of their liability where a parent who volunteered to assist them was injured on a "slide-for-life." An appellate court in Nebraska reversed in favor of the defendants.[44] The court maintained that the organization which leased the camp was not liable under the state's recreation liability act. The court added that even though the woman was an invitee, the district did not owe her a duty to inspect for, or warn her of, latent defects in the safety harness that was responsible for her injury.

In the first of four cases involving playgrounds, a student and his parents appealed a jury verdict in favor of the district after he fell and injured his head on an elementary school playground. The child, who was hurt when he attempted to dunk a basketball by jumping off the back of another student, suffered a closed head injury and was beset by behavioral problems after his accident. The Supreme Court of Iowa reversed in maintaining that the verdict was not adequately supported in fact and law.[45] The court reasoned that since the school had stipulated that it was negligent and there was evidence that some damages were proximately caused by its actions, the jury's not awarding any damages failed to effectuate substantial justice.

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[42] Gahan v. Mineola Union Free Sch. Dist., 660 N.Y.S.2d 144 [119 Educ. L. Rep. 1115] (N.Y. App. Div. 1997).

[43] Ackler v. Odessa-Montour Cent. Sch. Dist., 663 N.Y.S.2d 352 [121 Educ. L. Rep. 1102] (N.Y. App. Div. 1997).

[44] Teters v. Scottsbluff Pub. Sch., 567 N.W.2d 314 [120 Educ. L. Rep. 575] (Neb. Ct. App. 1997).

[45] Johnson v. Knoxville Community Sch. Dist., 570 N.W.2d 633 [122 Educ. L. Rep. 778] (Iowa 1997).

Where a student in California with a developmental disability broke his leg while playing on a playground during recess, it was unclear whether he fell from a slide or was hurt while running. In the ensuing negligence action, the district challenged the denial of its motion for summary judgment. An appellate court reversed in favor of the district.[46] The court asserted that the student and his parents failed to produce evidence to show the existence of a dangerous condition on school property or that he fell from the slide.

In New York, when a child was injured in a fall from the monkey bars at her parochial school's playground, her parents filed suit alleging negligent maintenance and supervision of its grounds. Following a jury verdict in favor of the school, an appellate court affirmed.[47] The court agreed that the verdict was not against the weight of the evidence with regard to whether the ground underneath the monkey bars was in a reasonably safe condition. The court acknowledged that the plaintiff's expert neither personally inspected the playground area nor took the student's height, weight or the height from which she fell into account, all factors that should have been relevant in determining the cause of the child's injuries.

A six-year-old fractured an elbow when she fell from the monkey bars during recess in her school's playground. Allegedly she fell because another child pried her fingers from the bars. The student and her mother claimed that the school district was negligent in failing to keep the playground in a reasonably safe condition and in not properly supervising the recess where there were two teachers looking after thirty to forty children. An appellate court in New York affirmed the denial of the district's motion for summary judgment.[48] Based on evidence presented by the student that her fingers were pried off the bars just prior to her fall, the court was of the view that there was a question of fact as to whether the presence or absence of supervision was a contributory factor in the child's injury. In addition, the court relied on evidence that the supervising teachers admitted they were planting a garden with other children and did not see the student until after she fell.

Spectators

After a spectator was fatally shot by a gang member as she left a fireworks show in a university stadium, the administrator of her estate appealed an adverse grant of summary judgment. The Supreme Court of Kansas affirmed that the university and its athletic association were not liable as they employed reasonable security measures since the shooting was not foreseeable.[49] The court decided that since there had been no other shootings at the event and the university had no information that gang members would be present, there was no reason to impute liability to it based on foreseeability even though the crime rate was high in the surrounding neighborhood.

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[46] Rio Linda Unified Sch. Dist. v. Sacramento County Super. Ct., 60 Cal. Rptr.2d 710 [115 Educ. L. Rep. 382] (Cal. Ct. App. 1997).

[47] Dillman v. Albany Roman Catholic Diocese, 655 N.Y.S.2d 133 [116 Educ. L. Rep. 1122] (N.Y. App. Div. 1997).

[48] Vonungern v. Morris Cent. Sch. Dist., 658 N.Y.S.2d 760 [119 Educ. L. Rep. 214] (N.Y. App. Div. 1997).

In South Carolina, a spectator unsuccessfully sued a district when she injured her ankle after stepping into a hole while attending her granddaughter's little league T-Ball game on school grounds. An appellate court agreed that the district was entitled to immunity since T-Ball qualified as a summer sport for the purposes of the state's recreational use statute.[50]

Employment

Of the nine cases dealing with employment, one involved an adverse decision; one concerned a contract dispute; one dealt with collective bargaining; five examined discrimination; and one presented a First Amendment concern.

Adverse Employment Decisions

Refusal to Award Coaching Contract

A tenured, credentialed teacher unsuccessfully applied for three coaching positions at a newly-opened high school in his district. When an individual who was not a district employee was hired for one of the positions, the teacher and his union filed for a writ of mandate to enjoin the school from hiring someone other than one of its teachers, unless none of them applied for a job. After a trial court denied the petition, an appellate court reversed. On further review, the Supreme Court of California held that the statute governing the hiring of athletic coaches demonstrated the legislative intent to provide an advantage to credentialed teachers presently employed by a district.[51] As such, the court asserted that districts must review the applications of credentialed teachers who already work for them before considering walk-ons.

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[49] Gragg v. Wichita State Univ., 934 P.2d 121 [117 Educ. L. Rep. 325] (Kan. 1997).

[50] Brooks v. Northwood Little League, 489 S.E.2d 647 [120 Educ. L. Rep. 838] (S.C. Ct. App. 1997).

[51] California Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist., 929 P.2d 1175 [114 Educ. L. Rep. 1195] (Cal. 1997).

Contract Disputes

A university sued its former football coach for liquidated damages after he allegedly breached his employment contract. A federal district court in Tennessee denied the coach's motion for summary judgment insofar as it believed that the liquidated damages clause was enforceable.[52] The court decreed that the liquidated damages provision, which required the coach, upon a breach, to pay to the university an amount equal to his base salary multiplied by the number of years remaining on the agreement, was reasonable in light of the potential actual damages that it might incur.

Collective Bargaining

A teachers' union appealed the denial of its request for a permanent injunction to prohibit a district from issuing extracurricular contracts during labor negotiations. The Supreme Court of North Dakota dismissed the case as moot.[53] The court found that since negotiations ended and the contracts had already expired, no actual controversy remained. Further, the court offered that the dispute did not involve such an important governmental interest as to justify its consideration under the "great public interest" exception to mootness.

Discrimination

Gender

A female basketball coach in Texas was involved in title IX complaints against her university. When she was denied a promotion to Athletic Coordinator, she sued the university claiming that it violated title IX by retaliating against her. After a federal district court denied the coach's request to amend her complaint to include charges under title VII, section 1983, and the Equal Pay Act, she appealed. The Fifth Circuit reversed in acknowledging that the coach stated a private cause of action for retaliation under title IX and that the district court abused its discretion in denying her motion to add other claims.[54]

In Ohio, a former assistant women's basketball coach unsuccessfully claimed that the university discriminated against her due to gender and race in forcing her to resign because she allegedly violated NCAA regulations. An appellate court affirmed a judgment in favor of the university.[55] The court noted that the coach failed to establish a prima facie case of discrimination because she could not show that the university replaced her or retained another person who was not in a protected class. The court also asserted that even if the coach could establish a prima facie case, she did not show that the university's reason for terminating her contract was a mere pretext for discrimination.

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[52] Vanderbilt Univ. v. Dinardo, 974 F. Supp. 638 [121 Educ. L. Rep. 175] (M.D. Tenn. 1997).

[53] Ashley Educ. Ass'n v. Ashley Pub. Sch. Dist., 556 N.W.2d 666 [114 Educ. L. Rep. 949] (N.D. 1996).

[54] Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242 [119 Educ. L. Rep. 341] (5th Cir. 1997).

Civil Rights

Where a college basketball coach sued the NCAA claiming that it wrongfully attempted to drive him out of the profession, a trial court denied its motion for a change of venue. On further review, the Supreme Court of Nevada affirmed.[56] The court pointed out that the NCAA failed to show that the jury pool was likely to have read inflammatory articles against it since most of them had been published several years before the trial date.

In a case from Michigan, the Sixth Circuit affirmed the dismissal of a former men's basketball coach's section 1983 action against his university.[57] The university dismissed the coach, who was an at-will employee, after an investigation uncovered evidence that he discriminated against one of his players based on national origin. The court rejected the coach's argument that the university deprived him of his right to due process in the way it conducted the investigation when it declared that he did not have such a right because, as an at-will employee, he did not have a property interest in continued pay and benefits.

Where a former head women's basketball coach and his assistant, neither of whom had a written contract, were fired for alleged NCAA violations, they filed suit claiming that the college ignored their rights to procedural due process by failing to give them notice or a hearing before their dismissals. A federal district court in Georgia granted the college's motion for summary judgment.[58] The court ascertained that as at-will employees who had no constitutionally protectable property interest in their jobs, the coaches were not entitled to due process.

First Amendment

A high school soccer coach was dismissed for allegedly suggesting in a newspaper article that his team members were cowards filed suit claiming that the school system violated his right to free speech. In dismissing the coach's complaint, the federal trial court in Massachusetts ruled that his remarks did not remotely satisfy the requirement that comments must be of public concern in order to enjoy constitutional protection.[59] The court concluded that the coach's comments did not rise to a level protected by the First Amendment.

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[55] McKenzie v. Wright State Univ., 683 N.E.2d 381 [120 Educ. L. Rep. 558] (Ohio Ct. App. 1996).

[56] National Collegiate Athletic Ass'n v. Tarkanian, 939 P.2d 1049 [119 Educ. L. Rep. 690] (Nev. 1997).

[57] Ludwig v. Board of Trustees of Ferris State Univ., 123 F.3d 404 [120 Educ. L. Rep. 975] (6th Cir. 1997).

[58] Wallace v. Board of Regents of the Univ. Sys. of Ga., 967 F. Supp. 1287 [119 Educ. L. Rep. 494] (S.D. Ga. 1997).

Miscellaneous

Criminal

A former football player alleged that coaches and university officials violated the Racketeer Influenced and Corrupt Organizations Act (RICO) and state law by exploiting talented athletes. More specifically, the player charged that university officials acted with impropriety in keeping athletes eligible for competition and that they improperly provided medical care for his injuries. A federal district court in Texas rejected the player's RICO claims since they were barred by the Eleventh Amendment.[60] The court dismissed the allegation that the university was liable for the player's knee injury because it was not compensable under RICO.

In California, the coach of a women's community college basketball team challenged his conviction for battery on school property after he struck one of his players during practice. An appellate court affirmed.[61] The court rejected the coach's argument that the trial judge erred in withdrawing a jury instruction it gave over a section of state law pertaining to a coach's privilege in disciplining players.

Prevailing Wage Act

In Michigan, a state university brought a declaratory judgment action to ascertain whether the Prevailing Wage Act applied to a construction project for a student recreational facility. After lower courts agreed that the Act, which requires contractors to pay construction workers on public projects the wage rate prevailing in the locality, did not apply because state appropriations did not directly finance the project, the state appealed. The Supreme Court of Michigan reversed in indicating that the statutory language "sponsored or financed in whole or in part by the state" applied because the university is an arm of the state government, thereby satisfying the requirement in the Act that such a project must be sponsored and financed by the state.[62]

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[59] Brayton v. Monson Pub. Sch., 950 F. Supp. 33 [115 Educ. L. Rep. 875] (D. Mass. 1997).

[60] Games v. Texas Tech Univ., 965 F. Supp. 886 [119 Educ. L. Rep. 140] (N.D. Tex. 1997).

[61] People v. Nelson, 67 Cal. Rptr.2d 899 [121 Educ. L. Rep. 269] (Cal. Ct. App. 1997).

Workers' Compensation

A coach who was injured in a car accident after returning a potential high school recruit to his home town sought further review of a grant of summary judgment in favor of the university and a car rental agency. An appellate court in Louisiana reversed in favor of the coach as to the car agency since there was a material question of fact as to which contract governed its relationship with the university.[63] However, the court affirmed that the university was properly granted summary judgment since the coach's sole remedy against it was workers' compensation where the risk which caused the accident unquestionably arose out of her employment duties.

Contracts

A contractor appealed a jury verdict in favor of a university where it sought to recover the cost of construction furnished in conjunction with the building of a sports facility. The contractor based the suit on its belief that the work was not originally included in the scope of the project. The Supreme Court of Rhode Island Supreme Court vacated and remanded.[64] The court posited that the trial judge erred in recognizing the existence of an implied-in-fact contract due to ongoing negotiations between the parties.

In Washington, a high school basketball coach sued the district for repayment of funds he advanced to purchase uniforms. The coach sought further review of a grant of summary judgment in favor of the district based on its claim that the statute of limitations had expired. An appellate court reversed.[65] The court was of the opinion that since the oral agreement between the coach and school officials was a demand loan, the three-year statute of limitations did not begin to run until he made a request for repayment, not when he made the loan.

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[62] Western Mich. Univ. Bd. of Control v. State, 565 N.W.2d 828 [119 Educ. L. Rep. 1122] (Mich. 1997).

[63] Bolton v. Tulane Univ. of La., 692 So. 2d 1113 [117 Educ. L. Rep. 1161] (La. Ct. App. 1997).

[64] Marshall Contractors. v. Brown Univ., 692 A.2d 665 [117 Educ. L. Rep. 1082] (R.I. 1997).

[65] Nilson v. Castle Rock Sch. Dist., 945 P.2d 765 [121 Educ. L. Rep. 846] (Wash. Ct. App. 1997).

Insurance

A homeowners' insurer sought a declaratory judgment that it was not required to indemnify or defend a student who set fire to the Astroturf in his university's football stadium. After a federal district court in Illinois maintained that the insurer was not obligated to defend the student, the Seventh Circuit affirmed.[96] The court asserted that setting fire to the field was precluded from coverage under the exclusion for property damage which is expected or intended by the insured.

Open Meetings Act

A state university's board of regents challenged a declaration that the Open Meetings Act covered its Athletic Council. An appellate court in Illinois affirmed that the Act applied because the Council was a public body.[97] The court decided that a public body cannot be exempted from the requirements of the Act simply because it may be a burden to comply.

Real Property

In Colorado, a state university unsuccessfully sought to enjoin a private stable that offered horseback tours in a national park from trespassing by creating trails across its property. On further review, an appellate court affirmed.[98] The court held that since the trails were a public highway, no trespass could occur.

Property owners sought further review of the dismissal of their nuisance action against a city and a school board based on the construction of a baseball field at an elementary school. An appellate court in Florida affirmed.[99] The court found that the board was immune from liability because its choice in building the field was a planning-level decision.

Conclusion

The rate of litigation involving sports in educational settings has remained fairly constant in recent years. Perhaps a trend worth watching is employment litigation related to civil rights issues, including the use of title IX in suits alleging retaliation against coaches who file title IX complaints. Cases related to the sexual abuse of students and athletes are also prevalent.

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[96] Nationwide Ins. v. Board of Trustees of the Univ. of Ill., 116 F.3d 1154 [119 Educ. L. Rep. 96] (7th Cir. 1997).

[97] Board of Regents of the Regency Univ. Sys. v. Reynard, 686 N.E.2d 1222 [122 Educ. L. Rep. 752] (Ill. App. Ct.).

[98] State v. Zahourek, 935 P.2d 74 [117 Educ. L. Rep. 746] (Colo. Ct. App. 1996).

[99] Paredes v. City of N. Bay Village, 693 So. 2d 1153 [118 Educ. L. Rep. 796] (Fla. Dist. Ct. App. 1997).

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HIGHER EDUCATION

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Introduction

Litigation involving higher education in 1997 covered a wide range of issues that continue to shape policy and practice. Intergovernmental relations and challenges to agency and legislative authority were before the courts. For example, a federal district court ruled on a California law that banned the use of gender and race in admissions and employment. Several courts considered the eligibility to serve requirements and the terms of office for members of boards of trustees. The American Bar Association, in its capacity as an accrediting agency for law schools, staved off an antitrust suit brought by a nonaccredited institution. The operation of public agencies and their committees in the "sunshine" under state laws examined activities such as presidential searches, student discipline, lists of required texts for courses, and animal use in research.

Questions of federal statutes and constitutional protections were also before the courts. The Seventh Circuit held that a nonsectarian invocation and benediction at a public university commencement did not violate constitutional provisions on the separation of church and state. ,Alabama and Mississippi were back in court continuing the scrutiny of the disestablishment of dual systems of higher education. Questions of whether sovereign immunity prevented the filing of claims under title VII and the Age Discrimination in Employment Act against state institutions were raised after the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*. Institutional compliance with the Americans with Disabilities Act for students who are learning disabled emanated from policy changes and pronouncements of the president of a private university. A First Amendment claim emerged when a university temporarily denied an Internet user access to a news group.

Employment rights and regulatory requirements generated numerous cases. Nontenured faculty continued to challenge nonrenewals or denials of tenure. In most cases, institutions continued to have success in defending their actions. Administrators and staff including at-will employees who lost their jobs continued to litigate under a wide array of issues. In a related vein, the Supreme Court found that a police officer who was arrested for drug offenses could be suspended without pay without a presuspension hearing but had to be given a timely post suspension hearing. An area of significant litigation involved claims of quid pro quo and hostile work environment sexual harassment brought by employees and students. Also subject to litigation was the question of benefits when in one case employees sought benefits for same sex partners. Several suits were also filed over early retirement incentives and the purchase of service credit.

Liability issues included the death of a student who consumed excessive amounts of alcohol during a fraternity activity. The scope of a university's duty was at issue when a professor murdered a student. Courts differentiated between the degree of a university's responsibility under assumption of risk when an athlete was injured during competition as opposed to when the risk of injury arose from flaws in equipment or was foreseeable. Contract liability and workers compensation questions continued as the number of cases on patent and copyright law increased.

The litigation reviewed in this chapter clarifies federal and state laws and practice. Thus, case law acts as a barometer identifying key policy issues facing higher education.

Intergovernmental Relations

The first case involves a suit by a class of California citizens directly affected by an amendment to the state constitution that prohibited race-and-gender conscious affirmative action programs. A federal trial court granted the citizens' request for a preliminary injunction based on the possibility that they would suffer irreparable injury combined with the fact that they demonstrated a clear potential for success on the case's merits.[1] The court also believed that the class would be successful in establishing that the amendment was an obstacle to the enforcement of title VII. However, the court asserted that the group would have to show that the amendment was an obstacle to other civil rights statutes.

Legislative Authority

In Illinois, a faculty union sued to block legislation aimed at making their formerly autonomous campus into a branch of the state university. The union insisted that the merger, which consolidated faculty bargaining units into one for the whole university, violated its rights to equal protection. A federal district court decided that insofar as bargaining is not a fundamental right, the legislation should be upheld since it was rationally related to a legitimate governmental end.[2] The court ascertained that the legislation had a legitimate goal of striving for cost savings, reducing competition among faculties for benefits, and preventing a single campus strike.

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[1] Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480 [114 Educ. L. Rep. 1146] (N.D. Cal. 1996).

In Kentucky, campus police officers sought to receive funds under the state's Law Enforcement Foundation Program. An appellate court contended that since the university was not a local government unit, campus police officers were not covered under the program.[3]

State Authority

A proprietary school sought injunctive relief and damages after the State Higher Education Service Corporation withheld tuition assistance payments. A federal trial court in New York denied the school's request for an injunction since the school would not have suffered irreparable damage had the state's action been left in place.[4] At the same time, the court declared that the school did not have a property right to tuition grant payments which entitled it to due process. However, in partially denying a motion to dismiss, the court decreed that there was sufficient evidence to evaluate whether the corporation violated equal protection by treating other schools differently.

In the first of three cases raising questions over the appointment or removal of members of boards of trustees, a holdover challenged the governor's right to replace him with an appointee who had not received the approval of the state senate. State law required an outgoing trustee to remain in office until a new appointee was approved. The Supreme Court of Alabama concluded that the trustee should continue to serve until the state senate approved the appointee.[5]

A case from Illinois involved legislation which terminated the current terms of elected members of a Board of Trustees and replaced them with individuals appointed by the governor. At issue was whether private attorneys could be compensated for costs incurred while representing an elected trustee's challenge to the law. An appellate court determined that while the trustee could not be reimbursed for private attorney's services, it could appoint a special counsel who could be reimbursed by the state.[6]

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[2] University Professionals of Ill., Local 4100, IFT-AFT, AFL-CIO v. Edgar, 114 F.3d 665 [118 Educ. L. Rep. 599] (7th Cir. 1997).

[3] Wellman v. Blanton, 927 S.W.2d 347 [112 Educ. L. Rep. 522] (Ky. Ct. App. 1996).

[4] Interboro Inst. v. Maurer, 956 F. Supp. 188 [117 Educ. L. Rep. 120] (N.D.N.Y. 1997).

[5] James v. Langford, 695 So. 2d 1158 [119 Educ. L. Rep. 736] (Ala. 1997); *see ex parte* James, 684 So. 2d 1315 [115 Educ. L. Rep. 205] (Ala. 1996).

[6] Tully v. Edgar, 676 N.E.2d 1361 [117 Educ. L. Rep. 249] (Ill. App. Ct. 1997).

In New York, a private university sought to prevent the State Board of Regents from conducting a hearing over the removal of its trustees. A trial court granted the Regents' motion to dismiss.[7] On further review, an appellate court affirmed that the Regents had not engaged in improper delegation of authority in recognizing a private group's petition to remove the trustees.[8] The court added that the Regents had the power to allow third parties to petition for the removal of trustees whose conduct falls within those proscribed by the state statute.

Board Authority

In California, a school district tried to prevent a community college from offering adult education programs within its boundaries unless the parties reached an agreement on the classes. An appellate court affirmed that state law did not require the college to come to an agreement with the district before it could offer adult education programs.[9]

Citizens challenged retrenchment decisions of the Board of Trustees of a city university. An appellate court in New York indicated that the board's reduction of the number of credits for associate and baccalaureate degrees was arbitrary and capricious.[10] However, the court agreed that long-range retrenchment plans were within the scope of the board's power.

Agency Authority

Where the New Mexico State Land Office preserved thirteen million acres of state land in trust for various schools and institutions of higher learning, gas lessees along with an oil and gas association questioned new regulations used to calculate payment of royalties under state oil and gas leases. The Tenth Circuit maintained that the state was not entitled to royalties on cash payments made to the lessee in settlement of a take or pay contract unless contested proceeds were eventually recouped by the lessee.[11] The court precluded summary judgment for the lessee on whether the proceeds were attributable solely to take or pay contract settlement deficiencies. Finally, the court remanded in noting that the state land commissioner exceeded his authority in expanding the definition of proceeds subject to royalty payments.

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[7] Adelphi Univ. v. Board of Regents of State of N.Y., 647 N.Y.S.2d 678 [113 Educ. L. Rep. 374] (N.Y. Sup. Ct. 1996).

[8] Adelphi Univ. v. Board of Regents of State of N.Y., 652 N.Y.S.2d 837 [115 Educ. L. Rep. 453] (N.Y. App. Div. 1997).

[9] Orange Unified Sch. Dist. v. Rancho Santiago Community College Dist., 62 Cal. Rptr. 2d 778 [117 Educ. L. Rep. 682] (Cal. Ct. App. 1997).

[10] Polishook v. City Univ. of N.Y., 651 N.Y.S.2d 459 [115 Educ. L. Rep. 46] (N.Y. App. Div. 1996).

[11] Harvey E. Yates Co. v. Powell, 98 F.3d 1222 [113 Educ. L. Rep. 586] (10th Cir. 1996).

In Florida, a petitioner disputed a university's readmission requirements and procedures for graduation. An appellate court observed that state laws placing the development of academic rules with the scope of the university's authority were not an improper delegation of legislative authority.[12]

A graduate of a split campus medical school unsuccessfully challenged a regulation that prohibited him from meeting residency eligibility requirements in a hospital in New York. An appellate court affirmed that the regulation was valid.[13]

The Illinois Public Employee Retirement System (PERS) requested a writ of mandamus to order state officials to comply with state law by making the proper contributions to the pension system. An appellate court pointed out that neither the separation of powers doctrine nor sovereign immunity prohibited the court from issuing a writ where the PERS properly alleged impairments of benefits and contracts.[14]

At issue in Louisiana was the selection of an individual to serve on a city municipal fire and police commission. A state statute required the executive head of an institution of higher education within the city to nominate individuals for the position. In the past, the university's chancellor had submitted the nominations. This time, however, both the chancellor and president of the university each submitted a list of nominees. When the city chose one of the chancellor's nominees, members of the local police union sued. An appellate court affirmed that the appointment was proper because under state law the president, rather than chancellor, is the executive head of the university.[15]

The Denver Water Board refused to grant a university a system development charge credit after the university reconfigured its water main supply system for a university health science center. The appellate court affirmed in favor of the water board on the basis that the denial of credit for one of two water main taps was not inconsistent with its regulations.[16]

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[12] Chaffin v. Florida State Univ., 680 So. 2d 463 [113 Educ. L. Rep. 991] (Fla. Dist. Ct. App. 1996).

[13] Pakin v. New York State Dep't of Health, 649 N.Y.S.2d 91 [114 Educ. L. Rep. 260] (N.Y. App. Div. 1996).

[14] People *ex rel.* Sklodowski v. State, 674 N.E.2d 81 [115 Educ. L. Rep. 397] (Ill. App. Ct. 1996).

[15] Baton Rouge Union of Police v. Baton Rouge, 696 So. 2d 642 [119 Educ. L. Rep. 754] (La. Ct. App. 1997).

[16] Regents of Univ. of Colo. v. City & County of Denver, 929 P.2d 58 [115 Educ. L. Rep. 89] (Colo. Ct. App. 1996).

License

After the Federal Communications Commission (FCC) rejected a university in California's competing application for a FM radio station license as untimely, the Circuit Court in the District of Columbia was of the opinion that the FCC acted arbitrarily and capriciously by failing to provide clear notice of the filing deadline.[17]

A proprietary school in New York challenged the state Department of Education's (DOE) denial of the renewal of its license. An appellate court reflected that since the time limits for the DOE's action were directory, its failure to act did not make renewal automatic.[18] The court also stated that the school was not entitled to a hearing over the nonrenewal because the DOE's rationale behind its decision was sound.

In the first of three cases from Ohio, students disputed the elimination of separate licensing procedures for the practice of mechanotherapy as violating due process and equal protection. At the same time, the state refused to change the licenses obtained by practitioners under the old system. An appellate court affirmed the constitutionality of the licensing scheme.[19]

A college of massotherapy sued when the state medical board put it on probation because its graduates failed to demonstrate minimally adequate performances on the massage therapy licensing examination. An appellate court in Ohio agreed that the board's actions were based on reliable probative evidence under state law containing language defining minimally adequate performance which was not vague.[20] Similarly, another appellate court in Ohio affirmed the state medical board's revocation of a college's certificate of good standing. The court agreed that the board's action was legitimate in light of the school's failure to comply with administrative rules and to provide the information requested.[21]

In California, a proprietary university challenged the Council for Private Postsecondary and Vocational Education's denial of its application for the right to award degrees in the state. An Administrative Law Judge acknowledged that although the university was not in compliance with the law, it had twenty-four months to do so. When the council again denied the university's application, an appellate court affirmed the denial of its petition for a writ of mandamus.[22] The court agreed that the council did not commit any procedural due process violations, its recommendations to achieve compliance were consistent with statutory provisions, and its decision was supported by substantial evidence.

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[17] State v. Federal Communications Comm'n, 102 F.3d 583 [114 Educ. L. Rep. 1026] (D.C. Cir. 1996).

[18] Court Reporting Inst. v. New York State Educ. Dep't, 659 N.Y.S.2d 930 [119 Educ. L. Rep. 634] (N.Y. App. Div. 1997).

[19] Ohio College of Ltd. Med. Practice v. Ohio State Med. Bd., 670 N.E.2d 490 [113 Educ. L. Rep. 393] (Ohio Ct. App. 1995).

[20] Midwestern College of Massotherapy v. State Med. Bd. of Ohio, 670 N.E.2d 1074 [113 Educ. L. Rep. 406] (Ohio Ct. App. 1996).

[21] Midwestern College of Massotherapy v. State Med. Bd. of Ohio, 675 N.E.2d 31 [115 Educ. L. Rep. 471] (Ohio Ct. App. 1996).

Accreditation

A nonaccredited law school brought an antitrust suit against the American Bar Association (ABA) and others, claiming that the ABA used accrediting procedures to enforce a group boycott while conspiring to monopolize legal education and entry into the practice of law. After a federal district court in Pennsylvania granted the defendants' motion for summary judgment,[23] the Third Circuit affirmed.[24] The court reasoned that since the rule of reason analysis for discovery was discretionary, the school was not entitled to access all the documents it submitted as part of the government's antitrust investigation. According to the court, the fact that some states refused to let the school's graduates sit for the bar examination could not serve as the basis for antitrust liability. The court concluded that the school had not been injured by the ABA's practice of fixing salaries at accredited institutions. Subsequently, the law school unsuccessfully tried to intervene in the government's antitrust action against the ABA. On further review, the circuit court for the District of Columbia affirmed the denial with regard to intervention but granted the school's request for access to information that it acquired in the course of the government's investigation.[25]

In a case from Arizona, Native American students sued an accrediting agency for monetary damages related to federally guaranteed student loans. The students claimed that the agency was negligent in both accrediting and failing to monitor their proprietary school. The students appealed after a federal district court dismissed their suit for failure to state a claim upon which relief could be granted. The Ninth Circuit affirmed that the lower court did not err in denying an amended complaint which alleged negligent misrepresentation and that the agency did not have a duty to students enrolled in an institution that it accredited.[26]

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[22] Kensington Univ. v. Council for Private Postsecondary & Vocational Educ., 62 Cal. Rptr. 2d 582 [117 Educ. L. Rep. 230] (Cal. Ct. App. 1997).

[23] Massachusetts Sch. of Law at Andover v. American Bar Ass'n, 937 F. Supp. 435 [113 Educ. L. Rep. 130] (E.D. Pa. 1996); *see also* Massachusetts Sch. of Law at Andover v. American Bar Ass'n, 952 F. Supp. 884 [116 Educ. L. Rep. 589] (D. Mass. 1997) (motion to dismiss defamation claim against the ABA) and Massachusetts Sch. of Law at Andover v. American Bar Ass'n, 959 F. Supp. 36 [117 Educ. L. Rep. 1032] (D. Mass. 1997) (motion to dismiss action against accreditation committee members for lack of jurisdiction granted).

[24] Massachusetts Sch. of Law at Andover v. American Bar Ass'n, 107 F.3d 1026 [116 Educ. L. Rep. 565] (3rd Cir. 1997).

[25] Massachusetts Sch. of Law at Andover v. United States, 118 F.3d 776 [120 Educ. L. Rep. 43] (D.C. Cir. 1997).

A corporation in Tennessee that operated a proprietary school in Florida enjoined the Accrediting Council for Independent Colleges and Schools (ACICS) from withdrawing its approval.[27] A federal trial court asserted that the facts presented by ACICS did not support its findings and that the school would not have suffered irreparable harm if the decision were left intact. As such, the court ordered ACICS to make additional findings based on the facts in the record.

Sunshine Laws

The issue of access to public documents and proceedings continued to be actively litigated. For example, where a professor at a public university gained access to records on labor relations, employment, and civil rights claims, the institution appealed. The Supreme Court of New Jersey reversed in favor of the university in declaring that attorney's bills and billing documents were not public records.[28] Yet, the court agreed that bills, billing documents, and legal submissions to courts or agencies were public records. Consequently, the court remanded for a determination of whether confidentiality would be compromised if the bills and billing records were released.

The editor of a campus newspaper sought access to records on student disciplinary proceedings. The Supreme Court of Ohio held that since the information was not an educational record, it was not exempt from disclosure under the Family and Educational Rights Privacy Act (FERPA).[29] The court added that under state law, the university had to disclose general locations of incidents resulting in disciplinary actions, the age and sex of students involved, the type of offenses committed, and any resulting disciplinary penalties.

A university contested an injunction that prevented it from denying a plaintiff access to data on the rate of nosocomial infections contracted by patients at its hospital. The Supreme Court of Iowa reversed in decreeing that the hospital had discretion whether to release information gathered by its Infection Control Subcommittee.[30]

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[26] Keams v. Tempe Technical Inst., 110 F.3d 44 [117 Educ. L. Rep. 116] (9th Cir. 1997).

[27] Florida College of Business v. Accrediting Council for Indep. Colleges and Schs., 954 F. Supp. 256 [116 Educ. L. Rep. 664] (S.D. Fla. 1996).

[28] Keddie v. Rutgers, the State Univ., 689 A.2d 702 [116 Educ. L. Rep. 720] (N.J. 1997).

[29] State *ex rel.* The Miami Student v. Miami Univ., 680 N.E.2d 956 [119 Educ. L. Rep. 219] (Ohio 1997).

[30] Burton v. University of Iowa Hosps. & Clinics, 566 N.W.2d 182 [119 Educ. L. Rep. 1138] (Iowa 1997).

Textbook dealers challenged the denial of their requests for information concerning lists of required texts for courses at two public universities under the state's Right to Know Act. The Supreme Court of Pennsylvania affirmed the denial at one university on the ground that the Act did not require it to provide information it did not collect.[11] As to the second university, which had provided the information, the court agreed that the case was moot.

Under Michigan's Open Meetings Act (OMA), a newspaper requested access to information on candidates for a university's presidency based on its argument that the selection committee appointed by the board of trustees was a public body. An appellate court reversed in contending that the OMA applied to the committee and that the process of winnowing candidates down to a narrow list of individuals who would be interviewed was subject to the OMA.[12] At the same time, the court affirmed that the university gave proper notice of the trustees' meeting that was called to review the committee's recommendations and that the board did not act improperly in delegating its selection activities to the committee.

In a second case from Michigan, plaintiffs sought access to public documents under the state's Freedom of Information Act (FOIA) rather than through discovery.[13] An appellate court indicated that the availability of discovery in pending litigation did not preclude access to public documents under FOIA.

Newspapers and reporters in Illinois tried to gain access to information on students who were awarded state legislator's scholarships. An appellate court ruled that under the state's FOIA, the information was per se exempt from disclosure.[14] The court added that disclosure was also prohibited under FERPA.

Where a university in Mississippi released part of a letter it received outlining violations of National Collegiate Athletic Association (NCAA) rules by students and alumni but refused to identify specific individuals, a newspaper publisher sought access to the information under the state's Public Records Act. A federal district court maintained that since the dispute was covered by state law, it was not removable to its jurisdiction simply because the university mentioned federal law as a possible defense.[35] As such, the court remanded to a state venue and awarded costs to the university.

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[11] Dynamic Student Servs. v. State Sys. of Higher Educ., 697 A.2d 239 [120 Educ. L. Rep. 189] (Pa. 1997).

[12] Federated Publications v. Board of Trustees of Mich. State Univ., 561 N.W.2d 433 [117 Educ. L. Rep. 301] (Mich. Ct. App. 1997).

[13] Central Mich. Univ. Supervisory-Technical Ass'n. v. Board of Trustees of Cent. Mich. Univ., 567 N.W.2d 696 [120 Educ. L. Rep. 794] (Mich. Ct. App. 1997).

[14] Gibson v. Illinois State Bd. of Educ., 683 N.E.2d 894 [120 Educ. L. Rep. 765] (Ill. App. Ct. 1997).

In the first of three cases from New York, a doctoral student sought the release of federal grand jury records regarding the testimony of one of a former government employee during a 1948 espionage investigation since the testimony was relevant to his dissertation. A federal district court wrote that public interest did not create an exception allowing disclosure because it was not called for under the Rules of Criminal Procedure.[36]

A professor requested access to complaints filed by administrators, faculty, and students under the university's conduct at a private institution in New York.[37] A federal district court found that even though a state statutory college existed within the private university, it was not subject to the provisions of the Freedom of Information Law (FOIL).

In a second case from New York, a public university challenged an order requiring it to release information to an animal rights group pursuant to a claim under the state's FOIL. An appellate court reversed in favor of the university.[38] The court noted that since the university's maintenance of records under the federal mandate and for federal review was not the performance of a governmental or proprietary function, it was not within the scope of the FOIL.

A contractor in Florida disputed the denial of its request for an injunction to stop a public college from awarding a training grant to a competitor. The contractor argued that even after soliciting bids, the board acted behind closed doors. An appellate court reversed in favor of the contractor.[39] The court observed that since the award should have been made in the open, the contractor's suit should have been permitted to proceed.

Taxation

Where a tax commission exempted a computer corporation, a lessee of land located in a research park, from the state's privilege tax, a county board of equalization appealed. The Supreme Court of Utah affirmed that exempting the lessees of property from a privilege tax fell within the law's exemptions of proceeds which benefitted religious, charitable, and educational institutions.[40] The court offered that the exemptions did not discriminate against the federal government or other nonprofit organizations.

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[35] Gannett River States Publishing Corp. v. Mississippi State Univ., 945 F. Supp. 128 [114 Educ. L. Rep. 807] (S.D. Miss. 1996).

[36] *In re* Craig, 942 F. Supp. 881 [114 Educ. L. Rep. 154] (S.D.N.Y. 1996).

[37] Stoll v. New York State College of Veterinary Med. at Cornell Univ., 652 N.Y.S.2d 478 [115 Educ. L. Rep. 429] (N.Y. Sup. Ct. 1996).

[38] Citizens for Alternatives to Animal Labs v. Board of Trustees of the State Univ. of N.Y., 658 N.Y.S.2d 653 [119 Educ. L. Rep. 203] (N.Y. App. Div. 1997).

[39] Silver Express Co. v. District Bd. of Lower Tribunal Trustees of Miami Dade Community College, 691 So. 2d 1099 [117 Educ. L. Rep. 1144] (Fla. Dist. Ct. App. 1997).

The Michigan Department of Treasury challenged a public university's claim that it was not subject to taxing provisions. An appellate court affirmed that the university did not have to assess sales tax on photocopies made in its library, on the service fee for replacing a diploma, on meals for students in its continuing education program, and on lodging for participants and their guests attending a development program.[41]

A state university sought further review of a judgment that property leased from its hotel and conference center was not exempt from an ad valorem tax. An appellate court in Alabama affirmed that since the property was not used exclusively for educational purposes, it was exempt from taxation.[42]

Zoning

In a case from California, a sorority that turned its chapter house into a boarding house unsuccessfully sued a rent stabilization board after it was assessed registration fees and penalties since it was no longer affiliated with the national association. The Ninth Circuit affirmed that even though the board acted in a dual role as adjudicator and executive body, it was not a biased decision-maker that could be accused of violating due process.[43]

An environmental group and the president of a homeowner's association disputed the dismissal of its action against a community college which purchased property for a new campus. An appellate court in Texas vacated on the basis that the group and its president had standing.[44]

In Florida, a county challenged the quashing of a licensing fine it levied against a corporation that installed sound equipment at a public university. An appellate court affirmed.[45] The court posited that a state university could contract for supplies, services, utility services, and building construction outside the jurisdiction of municipal or county charters and ordinances.

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[40] County Bd. of Equalization of Salt Lake County v. Utah State Tax Comm'n, 927 P.2d 176 [114 Educ. L. Rep. 653] (Utah 1996).

[41] University of Mich. Bd. of Regents v. Department of Treasury, 553 N.W.2d 349 [112 Educ. L. Rep. 1034] (Mich. Ct. App. 1996).

[42] Au Hotel, Ltd. v. Eagerton, 689 So. 2d 859 [117 Educ. L. Rep. 383] (Ala. Civ. App. 1996).

[43] Alpha Epsilon Phi Tau Chapter Housing Ass'n v. City of Berkeley, 114 F.3d 840 [118 Educ. L. Rep. 603] (9th Cir. 1997).

[44] Save Our Springs Alliance, v. Lowry, 934 S.W.2d 161 [114 Educ. L. Rep. 701] (Tex. Ct. App. 1996).

[45] Metropolitan Dade County v. Mayco, 697 So. 2d 1283 [120 Educ. L. Rep. 866] (Fla. Dist. Ct. App. 1997).

A city sought further review of a ruling that an ordinance prohibiting a college from making educational use of structures in an historic residential district was ultra vires. An appellate court in New York affirmed.[46] The court agreed that the ordinance was unconstitutional since it lacked a mechanism to balance the college's legitimate uses of its property against public health, safety, and welfare.

Eminent Domain

Where a university was negotiating with a railroad to purchase property adjacent to campus, it was unable to finalize the agreement because it had not determined how to use the land due to concerns over environmental cleanup. When a private group purchased the property, the university unsuccessfully brought condemnation proceedings. An appellate court in Minnesota affirmed that the university failed to articulate a purpose or intended use of the property in order to justify the condemnation.[47]

Property owners in Texas sought further review of a condemnation action filed by a community college system. At issue were the description of the property, service of notice, and the college's good faith effort to negotiate a fair price for the land prior to bringing condemnation proceedings. An appellate court stated that the original description, which was sufficient to pass title in a deed, was adequate for a condemnation proceeding.[48] The court added that since the property owners appeared and participated in the hearing, they could not challenge it on the ground of improper notice. The court concluded that the owners' payment of back taxes on the property should not have been used in calculating the market value of the property.

Environmental Regulations

A university received a fine after its power plant smokestack emitted a white smoke which impaired vision. On further review, an appellate court in New York confirmed that the relevant law, which listed violations either on the darkness of the smoke or the obscuring of vision, satisfied due process.[49]

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[46] Trustees of Union College v. Members of the Schenectady City Council, 656 N.Y.S.2d 425 [118 Educ. L. Rep. 423] (N.Y. App. Div.1997).

[47] Regents of Univ. of Minn. v. Chicago & N. W. Transp. Co., 552 N.W.2d 578 [112 Educ. L. Rep. 436] (Minn. Ct. App. 1996).

[48] Lin v. Houston Community College Sys., 948 S.W.2d 328 [119 Educ. L. Rep. 1265] (Tex. Ct. App. 1997).

[49] Rockefeller Univ. v. Department of Envtl. Protection of the City of N.Y., 651 N.Y.S.2d 45 [115 Educ. L. Rep. 40] (N.Y. App. Div. 1996).

A university in Massachusetts unsuccessfully filed suit against the state's Department of Public Utilities when it was assessed stranded recovery costs by an electric utility company. The university, which operated a cogeneration-qualified facility under the Public Utility Regulatory Policies Act, claimed that the assessment violated the nondiscriminatory rate regulations of the Federal Energy Regulatory Commission. The federal district court dismissed on the basis that the university's complaint was outside of its jurisdiction under the Act.[50]

Jurisdiction

A motorist who was charged with driving while under the influence of alcohol successfully challenged the authority of a campus police officer who arrested him on city property pursuant to a law that permitted university officers to act in areas adjacent to campus. On further review, an appellate court in Oklahoma reversed in favor of the state on the basis that the jurisdiction statute was not vague.[51] Conversely, the Supreme Court of Wyoming reasoned that a campus police officer lacked jurisdiction to arrest a motorist for driving under the influence of alcohol as he sped on an interstate highway adjacent to campus.[52] The court was of the opinion that the doctrine of fresh pursuit was inapplicable where the driver never entered the police officer's jurisdiction. Similarly, an appellate court in Pennsylvania affirmed that a motorist's license could not be suspended for one year for failure to submit to chemical testing where the arresting campus police officer lacked jurisdiction.[53] The court pointed out that even though the officer was on the force of a state-related university, he lacked jurisdiction to make an arrest on a city street.

In Utah, a student who was fined by the college's parking committee for parking in a space designated "handicapped" unsuccessfully sought further review in a state court. An appellate tribunal affirmed that the trial court lacked subject matter jurisdiction over the dispute.[54]

Ownership

A lending agency sued a private college for foreclosure and the sale of buildings after the school allegedly defaulted on a loan. When a trial court granted the lender's motion for summary judgment, the college appealed. The Supreme Judicial Court of Maine affirmed that the affidavit of the college's chairman of the board did not assert reliance supporting a defense of estoppel or forbearance.[55] The panel added that the trial court acted within its discretion in granting the lender protection from discovery.

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[50] Massachusetts Inst. of Technology v. Massachusetts Dep't of Pub. Util., 941 F. Supp. 233 [113 Educ. L. Rep. 1208] (D. Mass. 1996).

[51] State v. Ockershauser, 924 P.2d 775 [113 Educ. L. Rep. 939] (Okla. Crim. App. 1996).

[52] Marshall v. State *ex rel.* Dep't of Transp., 941 P.2d 42 [119 Educ. L. Rep. 1213] (Wyo. 1997).

[53] Horton v. Commonwealth, Dep't of Transp., 694 A.2d 1 [118 Educ. L. Rep. 1061] (Pa. Commw. Ct. 1997).

[54] Wisden v. Dixie College Parking Comm., 935 P.2d 550 [117 Educ. L. Rep. 782] (Utah Ct. App. 1997).

In Colorado, a state university unsuccessfully sought to enjoin a private stable which offered horseback tours in a national park from trespassing by creating trails across its property. On further review, an appellate court affirmed.[56] The court ascertained that since the trails were a public highway, no trespass could occur.

Federal Issues

Sovereign Immunity

The federal district court in Massachusetts considered whether the Regents of the University of California had the authority to waive Eleventh Amendment immunity. At issue was whether a citizen could seek a declaratory judgment against the Regents based on a claim that they improperly terminated a license agreement. After the Regents had the case removed to the federal district level, the court found the case lacked subject matter jurisdiction because the Regents had the authority to do waive immunity and had clearly done so.[57]

An employee of an electrical company was arrested for disorderly conduct when, in the process of notifying residents near a university that their power would be temporarily interrupted, he was stopped and questioned by police who were contacted by a suspicious homeowner. Subsequently, the employee filed a section 1983 action for false arrest against the university and its police. A federal district court in Illinois granted the defendants' motion to dismiss.[58] The court decreed that the police officers and the university's board of trustees had immunity.

Employees unsuccessfully claimed that their public university violated the Fair Labor Standards Act overtime provisions, the Maryland Wage and Hours Law, and breached their contracts in a dispute over wages. The federal district court dismissed in favor of the university on the basis that it enjoyed sovereign immunity under the Eleventh Amendment.[59]

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[55] Key Trust Co. of Me. v. Nasson College, 697 A.2d 408 [120 Educ. L. Rep. 209] (Me. 1997).

[56] State v. Zahourek, 935 P.2d 74 [117 Educ. L. Rep. 746] (Colo. Ct. App. 1996).

[57] Candela Corp. v. Regents of the Univ. of Cal. 976 F. Supp. 90 [121 Educ. L. Rep. 677] (D. Mass. 1997).

[58] Williams v. University of Ill. 945 F. Supp. 163 [114 Educ. L. Rep. 812] (N.D. Ill. 1996).

[59] Palotai v. University of Md. College Park, 959 F. Supp. 714 [118 Educ. L. Rep. 89] (D. Md. 1997).

Separation of Church and State

In Indiana, a law professor and two students in Indiana unsuccessfully tried to enjoin[60] a university president and vice president from allowing an invocation and benediction at a commencement ceremony. After a federal trial court also denied their motion for summary judgment,[61] the Seventh Circuit affirmed.[62] Relying on *Lee v. Weisman*[63] and *Lemon v. Kurtzman*,[64] the court found that college students were less impressionable than elementary and high school students. The court added that the 155-year practice of having a nonsectarian invocation and benediction at commencement did not endorse or disapprove of religion, nor did the selection of a cleric to conduct these functions create excessive entanglement with religion.

A municipal taxpayer challenged the constitutionality of industrial development bonds used to finance construction of buildings at a private, church-affiliated university. A federal district court asked the Supreme Court of Tennessee to consider whether the bonds were tax exempt within the meaning of state law. The court ruled that based on the language of the statute, the interest on the bonds was subject to state income tax.[65]

Criminal Charges

In Texas, a university and a community college basketball coach appealed their convictions for conspiracy, mail fraud, and wire fraud when they attempted to establish academic eligibility for students to play basketball at the university. The Fifth Circuit affirmed.[66] The court agreed that the coaches violated the right of honest service that the university could expect of its employees. The court added that this case did not criminalize mere deceit and that the honest service amendment to wire and mail fraud laws was not unconstitutionally vague.

Equal Protection

Female prisoners in the District of Columbia brought a class action suit claiming that the facility violated equal protection and title IX by not offering educational opportunities that were equal to those available to men. After a federal trial court modified an earlier corrective order, the District appealed. The Circuit Court declared that the availability of fewer programs for women did not violate either equal protection or title IX because male and female prisoners were not similarly situated.[67]

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[60] Tanford v. Brand, 883 F. Supp. 1231 [100 Educ. L. Rep. 116] (S.D. Ind. 1995).
[61] Tanford v. Brand, 932 F. Supp. 1139 [111 Educ. L. Rep. 1203] (S.D. Ind. 1996).
[62] Tanford v. Brand, 104 F.3d 982 [115 Educ. L. Rep. 339] (7th Cir. 1997).
[63] 505 U.S. 577 [75 Educ. L. Rep. 43] (1981).
[64] 403 U.S. 602 (1971).
[65] Steele v. Industrial Dev. Bd., 950 S.W.2d 345 [120 Educ. L. Rep. 860] (Tenn. 1997).
[66] United States v. Gray, 96 F.3d 769 [112 Educ. L. Rep. 637] (5th Cir. 1996).

Privacy

A private college sued a former clerical staff member and a former faculty member for allegedly violating the Electronic Communications Privacy Act. The college claimed that the clerical employee compromised the security of its e-mail system by sharing messages from the president with a faculty member that said the faculty member was going to be denied tenure. The clerical staff member claimed that he saw the message on the president's computer screen while making software repairs. The federal trial court in Delaware granted the defendants' motion for summary judgment.[68] The court indicated that glimpsing e-mail messages on the president's computer screen was not interception under the Act and that the college did not possess sufficient evidence to prove interception. The court added that the former faculty member lacked scienter under state law to be liable for misuse of e-mail messages and did not share responsibility for the former clerical employee's unauthorized access to the messages.

Employees

Title VI

Litigation surrounding the breakup of dual state systems of higher education in southern and border states continued. A federal trial court examined the ongoing desegregation of Alabama's system of higher education.[69] The plaintiffs unsuccessfully sought post-judgment interest on capital improvement funds which were to be paid to historically black colleges to rectify past discrimination. The court decided that the state's payment of such interest was barred by Eleventh Amendment immunity.[70] In a related case, employees of the Alabama Cooperative Extension Service (ACES) brought a class action suit alleging discriminatory employment policies. A federal district court dismissed on the ground that the ACES operated by Auburn no longer existed.[71] The court noted that the ACES was replaced by a consolidation of the extension services of Auburn and Alabama A & M.

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[67] Women Prisoners of D.C. Dep't of Corrections v. District of Columbia, 93 F.3d 910 [113 Educ. L. Rep. 30] (D.C. Cir. 1996).

[68] Wesley College v. Pitts, 974 F. Supp. 375 [121 Educ. L. Rep. 136] (D. Del. 1997).

[69] *See* United States v. Alabama, 628 F. Supp. 1137 [31 Educ. L. Rep. 62] (N.D. Ala. 1985), *rev'd and remanded*, 828 F.2d 1532 [41 Educ. L. Rep. 87] (11th Cir. 1987), *on remand*, Knight v. Alabama, 787 F. Supp. 1030 [74 Educ. L. Rep. 506] (N.D. Ala. 1991), *aff'd in part, rev'd in part, vacated*, 14 F.3d 1534 [89 Educ. L. Rep. 65] (11th Cir. 1993), *on remand, remedial decree*, 900 F. Supp. 272 [104 Educ. L. Rep. 310] (N.D. Ala. 1995).

[70] Knight v. United States, 962 F. Supp. 1442 [118 Educ. L. Rep. 913] (N.D. Ala. 1996).

Black citizens sued state officials over the allegedly racially dual system of higher education in Mississippi. The Fifth Circuit held that the adoption of uniform admissions standards and establishing a new remedial program was proper but that eliminating established remedial courses was not.[72] In addition, the court contended that issues over a proposed merger of an historically black institution and an historically white institution needed to be examined and that further findings of fact were needed to determine if equipment discrepancies existed between the two insititutions. The court concluded that the state's formula for funding higher education, its hiring and salary practices, and the governing board's racial composition were not traceable to its prior de jure segregated system.

Title VII

Procedures

The first of two cases dealing with whether Congress abrogated a state's Eleventh Amendment immunity arose in Illinois. A federal trial court acknowledged that a former employee's title VII claims against a state university were not barred by Eleventh Amendment immunity.[73] The court added that the plaintiff exhausted her administrative remedies for some of her Age Discrimination in Employment Act (ADEA) and title VII claims but not for others. The court maintained that a claim filed with the EEOC, which included a charge under the Equal Pay Act (EPA), had not tolled the limitations period.

A job applicant filed a title VII discrimination claim against a state university alleging that it violated the Vietnam Era Veterans Readjustment Act, an Executive Order requiring inclusion of equal opportunity clause in federal contracts, the state Human Rights Act, and the Fourteenth Amendment. A federal trial court in Tennessee granted the university's motion for summary judgment on all but the title VII and Fourteenth Amendment claims.[74] The court observed that the Eleventh Amendment barred the applicant's remaining claims against the university trustees and officials in their official capacities.

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[71] Strain v. Muse, 940 F. Supp. 302 [113 Educ. L. Rep. 819] (M.D. Ala. 1996).

[72] Ayers v. Fordice, 111 F.3d 1183 [117 Educ. L. Rep. 840] (5th Cir. 1997).

[73] Gehrt v. Univ. of Ill. at Urbana-Champaign Coop. Extension Serv., 974 F. Supp. 1178 [121 Educ. L. Rep. 183] (C.D. Ill. 1997).

[74] Stefanovic v. University of Tenn., 935 F. Supp. 944 [112 Educ. L. Rep. 869] (E.D. Tenn. 1996).

A university administrator appealed a verdict in favor of her employer in her sex discrimination suit based on title VII, the EPA, and the state's Fair Employment Act. The Supreme Court of Vermont reversed in favor of the administrator.[75] The court ruled that a pass on the use of a peremptory challenge was not a waiver until a jury was sworn in and that the administrator could exercise her final peremptory challenge prior to the jury's being impaneled. Further, the court offered that evidence of the positive performance of the person who was hired for the position was inadmissible.

The first of two cases from Minnesota to reach the Eighth Circuit involved an appeal by a university where a consent decree governed a gender discrimination suit filed by a female employee who charged that she was retaliatorily discharged in violation of title VII. The Eighth Circuit reversed in favor of the university.[76] The panel was of the opinion that since the consent decree had expired, the federal district court lacked authority to consider a claim on matters occurring after its expiration.

A female lecturer challenged a grant of summary judgment in favor of the university when she sued for sex discrimination claiming that it violated a consent decree requiring it to make a good faith effort to hire approximately well qualified female candidates. The Eighth Circuit affirmed that the lecturer could not object to a special master's unfavorable report in connection with her claim and that her department's failure to recalculate gender statistics after hiring a male was not a pretext for discrimination.[77] The court added that the department's failure to maintain all reports under its hiring policy did not establish that the university did not act in good faith in making the hiring decision.

In Alabama, a dismissed divinity school professor brought an unsuccessful title VII religious discrimination claim against the seminary. The Eleventh Circuit affirmed a grant of summary judgment in favor of the university on the ground that it did not lose its religious exemption under title VII when it failed to follow institutional policy governing dismissals.[78]

Where a former university employee filed title VII and EPA claims 297 days after the last discriminatory incident, the federal district court in New Hampshire reasoned that she automatically waived the sixty-day exclusive jurisdiction agreement of the state's Human Rights Commission with the EEOC.[79] The court subsequently posited that the university's motion for summary judgment was precluded because there were unresolved material issues of fact.[80] The court also reflected that since the employee had complained of a continuing violation, the claim was filed in a timely manner.

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[75] Ballard v. University of Vt., 693 A.2d 713 [118 Educ. L. Rep. 419] (Vt. 1997).
[76] Musso v. University of Minn., 105 F.3d 409 [115 Educ. L. Rep. 357] (8th Cir. 1997).
[77] Kobrin v. University of Minn., 121 F.3d 408 [120 Educ. L. Rep. 428] (8th Cir. 1997).
[78] Killinger v. Samford Univ., 113 F.3d 196 [118 Educ. L. Rep. 48] (11th Cir. 1997).
[79] Bergstrom v. University of N.H., 943 F. Supp. 130 [114 Educ. L. Rep. 479] (D.N.H. 1996).

In Alabama, a federal trial court stated that a letter sent to the EEOC before the 180-day time period had lapsed, which identified the parties involved and the allegedly discriminatory practices, was sufficient to constitute the filing of a complaint.[81] As such, the court denied the university's motion to dismiss.

Venue was at issue where a university employee who lived in the northern district of Illinois filed a racial discrimination claim under title VII.[82] The court transferred the case to the central district not only because the alleged discrimination occurred there but also because it was more convenient for the witnesses.

In North Carolina, an employee who was dismissed by a state university sued it and its officials alleging discrimination and seeking punitive damages, back pay, and other relief. A federal trial court was of the view that title VII barred punitive damage claims against the university and officials in their official capacities.[83] In addition, the court pointed out that since the termination decision was delegable, it could not sustain a claim against individuals in their individual capacities.

A state university in Oregon sought to protect an investigation by its legal counsel from discovery based on attorney-client privilege. The issue arose during an employment discrimination trial when the plaintiff's attorney submitted a deposition from a professor about the department chair's discussion of a report at a faculty meeting. An appellate court judged that the department head's comments to a faculty member did not waive attorney-client privilege because both individuals were representatives of the university.[84]

Burden of Proof

A university appealed a jury verdict in favor of a white female faculty member who claimed that it violated title VII and the EPA since she earned less that a black male who was hired a year earlier. The Supreme Court of Nevada reversed in favor of the university.[85] According to the court, the university show business related reasons to explain the disparity.

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[80] Bergstrom v. University of N.H., 959 F. Supp. 56 [117 Educ. L. Rep. 1038] (D.N.H. 1996).

[81] Moore v. Ala. State Univ., 945 F. Supp. 235 [114 Educ. L. Rep. 815] (M.D. Ala. 1996).

[82] Doage v. Board of Regents, 950 F. Supp. 258 [115 Educ. L. Rep. 902] (N.D. Ill. 1997).

[83] Bryant v. Locklear, 947 F. Supp. 915 [115 Educ. L. Rep. 662] (E.D.N.C. 1996).

[84] State *ex rel.* Or. Health Sciences Univ. v. Haas, 942 P.2d 261 [120 Educ. L. Rep. 805] (Or. 1997).

[85] University and Community College Sys. of Nev. v. Farmer, 930 P.2d 730 [115 Educ. L. Rep. 527] (Nev. 1997).

In Michigan, a federal trial court granted a university's motion for summary judgment where an employee failed to establish a prima facie case of racial discrimination in a title VII termination dispute.[86] The court ascertained that the employee was unable to demonstrate that the university's reasons for dismissing him were a pretext for racial discrimination.

A black female faculty member in Alabama whose contract was not renewed at a historically white community college effectively presented a disparate treatment claim under title VII and the Equal Protection Clause.[87] Relying on circumstantial evidence, a federal trial court asserted that the faculty member established a prima facie case of discrimination. The court decreed that by establishing an intent to discriminate, the woman could show that the proffered reasons for her nonrenewal were a pretext.

Where a former research assistant claimed that he was demoted, and ultimately dismissed, when paired with another employee after his grant funds expired, a federal trial court in New York granted the university's request for summary judgment in his title VII suit.[88] The court declared that the research assistant's contract was not renewed based on his poor performance evaluations and his unauthorized, premature disclosures of incomplete research results. The court added that the charges listed by the research assistant in his EEOC claim were not reasonably related to his demotion and termination allegations and that he failed to establish a prima facie case of national origin discrimination.

Disparate Impact

Female faculty members in Rhode Island unsuccessfully sued their university claiming that its salary schedule had a disparate impact on them because they were concentrated in the humanities and sciences, areas that had lower salaries than business.[89] On further review, the First Circuit affirmed in favor of the university.[90] The court found that the salary plan did not have a disparate impact on women in general or the plaintiffs in particular. The court decided that a faculty member's choice of academic field and the workings of the national market, not the university's salary schedule, resulted in the salary differential.

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[86] Perkins v. Regents of Univ. of Mich., 934 F. Supp. 857 [112 Educ. L. Rep. 241] (E.D. Mich. 1996).

[87] LaFleur v. Wallace State Community College, 955 F. Supp. 1406 [116 Educ. L. Rep. 1026] (M.D. Ala. 1996).

[88] Sammy v. Cornell Univ., 961 F. Supp. 489 [118 Educ. L. Rep. 297] (W.D.N.Y. 1997).

[89] Donnelly v. Rhode Island Bd. of Governors for Higher Educ., 946 F. Supp. 147 [114 Educ. L. Rep. 1069] (D.R.I. 1996).

[90] Donnelly v. Rhode Island Bd. of Governors for Higher Educ., 110 F.3d 2 [117 Educ. L. Rep. 106] (1st Cir. 1997).

A black female secretary in New York unsuccessfully brought title VII claims based on race and gender against her university when it hired a white male for a job she wanted. A federal district court determined that the woman failed to prove that the legitimate nondiscriminatory reason offered by the university, namely, that the male had more experience, was a pretext for discrimination.[91] The court indicated that while the woman showed that the relationship between her poor performance and poor evaluations was pretextual, she did not establish that the evaluations were linked to race or gender.

Retaliation

A student who testified on behalf of a professor in a title VII claim against her private college later sued it for retaliation under title VII after her grades were mysteriously changed from a 3.969 grade point average to a 2.2, she received failing grades in courses during her final semester, and she failed to graduate. A jury in a federal district court in North Carolina awarded the student compensatory and punitive damages for reckless infliction of emotional distress. On further review, the Fourth Circuit affirmed.[92] The court held that violations of the sequence of evidentiary rules were harmless since they did not affect the substantial rights of either the student or college. In addition, the court agreed that issues of punitive damages were properly submitted to the jury and that the student's costs were properly assessed.

In North Dakota, a jury in federal district court maintained that discrimination based on national origin discrimination was not the motivating factor in a professor's dismissal from a state university.[93] However, the court contended that the motivating factor behind the university's action was retaliation for the professor's filing an EEOC claim. Therefore, the court stated that since the passage of the 1991 Civil Rights Act Amendments, the professor was entitled to attorney fees in his case of mixed motives wherein discrimination is a motivating factor even if a defendant would have made the same decision absent the discrimination.

A faculty member at a private university whose contract was not renewed claimed retaliation under titles VII and IX after he helped a student with a gender discrimination claim against another instructor. A federal trial court in Alabama granted the university's motion to dismiss.[94] The court observed that since the faculty member failed to show that the female student whose case he championed was the victim of any adverse employment action by the institution, his retaliation claim under title VII was without merit. The court added that there is no private right of action for retaliation under title IX.

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[91] Carter v. Cornell Univ., 976 F. Supp. 224 [121 Educ. L. Rep. 695] (S.D.N.Y. 1997).

[92] Ross v. Saint Augustine's College, 103 F.3d 338 [115 Educ. L. Rep. 245] (4th Cir. 1996).

[93] de Llano v. North Dakota State Univ., 951 F. Supp. 168 [115 Educ. L. Rep. 949] (D.N.D. 1997).

[94] Holt v. Lewis, 955 F. Supp. 1385 [116 Educ. L. Rep. 1021] (N.D. Ala. 1995).

Damages

A faculty member who won a jury trial on a title VII claim for denial of tenure at a state college sought reinstatement and damages. A federal district court in Colorado offered that reinstatement was not feasible where the relationship had deteriorated and the faculty member admitted that he did not trust his supervisors.[95] However, the court ruled that front pay was a proper remedy for the college's violation of title VII's retaliation provisions.

The Equal Pay Act

An employee unsuccessfully brought title VII and EPA claims against a public university in Alabama. A federal district court granted the university's motion to dismiss on the ground that Congress could not abrogate state immunity from prosecution under the EPA.[96]

Title IX

A female basketball coach in Texas sued her university for allegedly violating title IX by retaliating against her in denying her promotion to Athletic Coordinator due to her involvement in title IX complaints against the institution. After a federal district court denied the coach's request to amend her complaint to include charges under title VII, section 1983, and the EPA, she appealed. The Fifth Circuit reversed in positing that the coach stated a private cause of action for retaliation under title IX and that the district court abused its discretion in denying her motion to add other claims.[97]

Age Discrimination in Employment

At least six cases involved whether Eleventh Amendment immunity shields public institutions from prosecution under the ADEA. Most of these suits involved the interpretation of the recent Supreme Court ruling in *Seminole Tribe of Florida v. Florida*.[98] Citing *Seminole*, federal district courts in Minnesota[99] and in Alabama[100] were of the opinion that Congress had not abrogated such immunity under the ADEA. However, federal district courts in Texas[101] and Kansas[102] pointed out that under the powers given Congress through the Fourteenth Amendment, the state's Eleventh Amendment immunity under the ADEA had been abrogated. The Tenth Circuit, in a second case from Kansas, reasoned that the Eleventh Amendment did not bar a private citizen from filing suit for an alleged violation of the ADEA.[103] The court added that a university's striking a sole black juror was race neutral and that the employee failed to prove that its proffered reason for his dismissal was a pretext for discrimination.

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[95] Thornton v. Kaplan, 961 F. Supp. 1433 [118 Educ. L. Rep. 331] (D. Colo. 1996).

[96] Larry v. Board of Trustees of Univ. of Ala., 975 F. Supp. 1447 [121 Educ. L. Rep. 673] (N.D. Ala. 1997).

[97] Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242 [119 Educ. L. Rep. 341] (5th Cir. 1997).

[98] 116 S. Ct. 1114 (1996). *See* The Yearbook of Educ. Law 1997, p. 249 for a discussion of this case (1997).

In a case from New York, a federal district court addressed a motion for protective order in a professor's national origin and age discrimination retaliation claim. The court denied the university's attempt to protect the dean of the medical college from giving a deposition based on the notion that he had no recollection of communications with the professor.[104]

Retirement Benefits

An employee of a university in California appealed an adverse grant of summary judgment in his suit claiming that offsetting disability benefits with pension benefits, which could only be received at retirement, violated the ADEA. The Ninth Circuit reversed in stating that, by offsetting the disability benefits, the university had, in effect, coerced the employee to retire in violation of the ADEA.[105] Further, the court reflected that since the employee was ineligible for a pension until retirement, he was not protected by the safe harbor provisions of the ADEA which allow the offsetting of long-term disability benefits.

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[99] Humenansky v. Board of Regents of the Univ. of Minn., 958 F. Supp. 439 [117 Educ. L. Rep. 606] (D. Minn. 1997).

[100] MacPherson v. University of Montevallo, 938 F. Supp. 785 [113 Educ. L. Rep. 301] (N.D. Ala. 1996).

[101] Hodgson v. University of Tex. Med. Branch at Galveston, 953 F. Supp. 168 [116 Educ. L. Rep. 599] (S.D. Tex. 1997).

[102] Teichgraeber v. Memorial Union Corp. of the Emporia State Univ., 946 F. Supp. 900 [114 Educ. L. Rep. 1075] (D. Kan. 1996).

[103] Hurd v. Pittsburg State Univ., 109 F.3d 1540 [117 Educ. L. Rep. 95] (10th Cir. 1997).

[104] Naftchi v. New York Univ. Med. Ctr., 172 F.R.D. 130 [118 Educ. L. Rep. 693] (S.D.N.Y. 1997).

[105] Kalvinskas v. California Inst. of Technology, 96 F.3d 1305 [112 Educ. L. Rep. 694] (9th Cir. 1996).

Burden of Proof

In Wisconsin, an applicant for a teaching position appealed the rejection of his age discrimination claim. The Seventh Circuit affirmed that the college's screening and numerical ranking methodology of candidates was free of any discrimination.[106]

Where an applicant for a tenure track position successfully claimed age discrimination in hiring before a federal jury in Pennsylvania, the court ascertained that the college was not obliged to bump an innocent third party and install the applicant in the position or to create another job for her.[107] The court did assert that the applicant was entitled to front pay and interest on back pay but not liquidated damages.

When a university employee who received a performance improvement counseling letter filed a grievance over allegedly age related remarks made by her department head, the institution asked her to withdraw her age discrimination claim with the EEOC. Subsequently, the employee sued the university over this request. A federal district court in Tennessee granted the university's motion for summary judgment.[108] The court believed that the proposed settlement award was not an adverse employment action necessary to establish a prima facie case under the ADEA.

A faculty member from Iran filed claims of ancestry discrimination under section 1981, national origin discrimination under title VII, and age discrimination under the ADEA when he was denied incentive pay, had his salary reduced, and deprived of leadership positions in his department. A federal district court in Illinois granted the university's motion to dismiss on the basis that the professor failed to establish any of his claims.[109]

Termination

The first of four cases alleging age discrimination when positions were terminated was filed by professors in Pennsylvania who claimed that their forced retirements violated the ADEA. After a federal trial court partially granted the university's motion for summary judgment, the professors appealed. The Third Circuit, affirming in part, contended that a state court's decision that a professor's one-year employment agreement with the university did not obligate it to renew the contract was binding under collateral estoppel.[110] The court held that when the professors failed to prove their claim that the university's mandatory retirement policy was exempted by the ADEA, they were unable to establish the equitable tolling exception to the Act's filing limitations period. Yet, the court declared that one professor's ADEA claim was not time barred because it accrued on the day that the university invoked its mandatory retirement policy.

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[106] Senner v. Northcentral Technical College, 113 F.3d 750 [118 Educ. L. Rep. 63] (7th Cir. 1997).

[107] Kraemer v. Franklin & Marshall College, 941 F. Supp. 479 [113 Educ. L. Rep. 1221] (E.D. Pa. 1996).

[108] Hansen v. Vanderbilt Univ., 961 F. Supp. 1149 [118 Educ. L. Rep. 318] (M.D. Tenn. 1997).

[109] Behnia v. Shapiro, 961 F. Supp. 1234 [118 Educ. L. Rep. 324] (N.D. Ill. 1997).

[110] Courtney v. La Salle Univ., 124 F.3d 499 [121 Educ. L. Rep. 56] (3d Cir. 1997).

Where an employee in a university's physical plant was dismissed because he continued to make amorous overtures toward an unwilling female employee despite having been warned to cease, he alleged that he was fired due to his age. A federal district court in Illinois granted the university's motion for summary judgment in the employee's ADEA claim. The Seventh Circuit affirmed that the university's legitimate reasons for the dismissal were not a pretext for age discrimination.[111]

In New York, a sixty-seven-year-old professor who had also served as a dean and program director entered into a renewable multi-year employment contract with the college. A controversy arose when, in the course of renegotiations, the college was unable to reduce the professor's salary; instead, he accepted its offer of a one-year terminal contract. A federal trial court granted the college's motion to dismiss the professor's ADEA claim.[112] The court decided that the professor's contract was ratified and completed even though it failed to comply with the state's Older Workers Act. The court added that the professor's dismissal claim was time barred.

A research assistant in Michigan unsuccessfully claimed that her dismissal was motivated by age discrimination. On further review, an appellate court affirmed that the research assistant's poor performance was a legitimate reason for her discharge.[113]

Rehabilitation Act of 1973 and Americans with Disabilities Act

At least six actions were filed claiming violations of the Americans with Disabilities Act (ADA). In a Massachusetts case which received national attention, a university president publicly likened learning disabilities to an epidemic on college campuses. Students with learning disabilities and support organizations sued the university claiming that the president's speeches and the university's new regulations created a discriminatory and hostile environment for students with learning disabilities. Although finding that it was not strictly necessary, the federal district court granted the plaintiffs' motion to be certified as a class.[114] The court added that there was a valid action under ADA and the Rehabilitation Act for allegations over the creation of a hostile, intimidating, and offensive environment. In fact, the court wrote that under title VII, the hostile work environment would apply to a hostile learning environment. Yet, the court indicated that under the university's new accommodations policy, complaints were not sufficient to establish a claim for hostile environment discrimination. At the same time, the court judged that only one of the four organizations attempting to join the complaint had standing.

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[111] O'Connor v. DePaul Univ., 123 F.3d 665 [120 Educ. L. Rep. 995] (7th Cir. 1997).

[112] Hodge v. New York College of Podiatric Med., 940 F. Supp. 579 [113 Educ. L. Rep. 1139] (S.D.N.Y. 1996).

[113] Meagher v. Wayne State Univ., 565 N.W.2d 401 [119 Educ. L. Rep. 659] (Mich. Ct. App. 1997).

In the first of two cases where federal district courts granted motions for summary judgment in favor of the universities, a black woman in Maryland sued claiming discrimination based on a disability when she was dismissed from a temporary position. When the woman accepted the job, she informed her supervisor that she had medical conditions which was due to stress and may require she work a reduced schedule. Even when the woman's work hours were reduced, she was unable to put in the requisite time. A federal district court granted the college's motion for summary judgment on the ground that when the accommodation was insufficient, the woman was not qualified for the job.[115] The court concluded that the woman failed to establish a basis for a racial discrimination claim under title VII.

Where a security officer was stripped of his firearm and given a job as a dispatcher due to a mental impairment, he unsuccessfully sued the university claiming that it discriminated based on his disability. A federal district court in Pennsylvania granted the university's motion for summary judgment.[116] The court maintained that the officer could not bring a claim under the ADA for an alleged discriminatory act that knowingly occurring before its passage. In addition, the court noted that the officer failed to show that his mental impairment essentially limited life activities or that university officials regarded him as being impaired since they established that he posed a threat to the safety of others.

In New Hampshire, the federal district court denied a college's motion for summary judgment in a suit over whether it regarded one of its faculty members as impaired. However, the court granted the college's motion to dismiss her wrongful discharge claim because it was precluded by the ADA claim.[117] After a jury entered a verdict in favor of the faculty member, the court found that she was entitled to reinstatement but that her damage awards for breach of contract and ADA claims were duplicative.[118]

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[114] Guckenberger v. Boston Univ., 957 F. Supp. 306 [117 Educ. L. Rep. 500] (D. Mass. 1997).

[115] Foremanye v. Board of Community College Trustees for Baltimore County, 956 F. Supp. 574 [117 Educ. L. Rep. 141] (D. Md. 1996).

[116] Layser v. Morrison, 935 F. Supp. 562 [112 Educ. L. Rep. 830] (E.D. Pa. 1995).

Where an employee sued his university over its failure to accommodate his disability, the federal trial in Maine denied its motion for summary judgment on his ADA and Rehabilitation Act claims.[119] The court did grant the college's motion on the employee's emotional distress charge.

The federal trial court in Kansas denied a community college's motion for summary judgment when it was sued by an employee.[120] The court mandated that there were material issues of fact in need of resolution over whether the college's grounds for dismissing the employee were a pretext for disability discrimination.

Hiring Discrimination

An employee in California who filed a pro se civil rights action appealed a judgment as a matter law in favor of the university. The Ninth Circuit reversed on the basis that the trial court failed to apprise the employee about the deficiencies of his proof and give him another opportunity to present further evidence before rendering judgment as a matter of law.[121]

In Tennessee, a job applicant claimed that university officials violated title VII and the Fourteenth Amendment when he was not selected for a position. A federal district court dismissed the action since the claims against the officials in their individual capacities were barred by the statute of limitations.[122]

An African-American applicant unsuccessfully sued a university when he was not hired for a job as a campus police officer. The federal trial court in Colorado observed that the applicant failed to provide evidence demonstrating that the university's proffered reasons were a pretext for discrimination.[123]

Where a Canadian citizen sued a university for citizenship discrimination in employment, a federal trial court in Texas permitted her claim to proceed under section 1981 but not under title VII since she established a prima facie case of discrimination.[124] The court added that the woman's equal protection charge was not precluded even though it was based on grounds similar to the title VII claim.

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[117] Nedder v. Rivier College, 944 F. Supp. 111 [114 Educ. L. Rep. 514] (D.N.H. 1996).

[118] Nedder v. Rivier College, 972 F. Supp. 81 [120 Educ. L. Rep. 1003] (D.N.H. 1997).

[119] Kilroy v. Husson College, 959 F. Supp. 22 [117 Educ. L. Rep. 1028] (D. Me. 1997).

[120] Schnake v. Johnson County Community College, 961 F. Supp. 1478 [118 Educ. L. Rep. 340] (D. Kan. 1997).

[121] Waters v. Young, 100 F.3d 1437 [114 Educ. L. Rep. 379] (9th Cir. 1996).

[122] Stefanovic v. University of Tenn., 935 F. Supp. 950 [112 Educ. L. Rep. 875] (E.D. Tenn. 1996).

[123] Drake v. City & County of Denver, 953 F. Supp. 1150 [116 Educ. L. Rep. 634] (D. Colo. 1997).

A particle physicist who was enticed into taking a postdoctoral position alleged promissory estoppel, breach of contract, and quantum meruit when the university did not hire him as a faculty member. The Court of Claims of Ohio entered a judgment in favor of the university.[125] The court was of the opinion that the plaintiff should not have relied on a promise to hire him for a job that was about to be vacated due to retirement since any such offer was rendered void when the university eliminated the position. Further, the court posited that the physicist could not recover damages under quantum meruit for any teaching tasks that he voluntarily performed beyond the duties of his position.

Nontenured Faculty

First Amendment Speech

In a case involving the First Amendment and the World Wide Web, a professor claimed that the university violated his First Amendment right to free speech when he was denied access to a news group because his information contained allegedly obscene materials. A federal trial court in Oklahoma denied the professor's claim for relief when the university developed a second server that was opened to all news groups but required users to be over the age of eighteen.[126]

The dean and associate dean of a law school in Texas appealed a jury verdict in favor of white professors who claimed racial discrimination and retaliation in violation of their rights to free speech and substantive due process. The claims arose when, after the professors made statements about the appointment of black students to various committees, the dean gave them arbitrary or unfair performance evaluations or salary increases. The Fifth Circuit affirmed that the associate dean discriminated against the professors based on race when he and the dean provided arbitrary and capricious merit pay evaluations.[127] At the same time, the court reversed in stating that the dean's criticism and failure to award pay increases were not adverse employment actions that could support a retaliation claim under the First Amendment.

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[124] Chacko v. Texas A & M Univ., 960 F. Supp. 1180 [118 Educ. L. Rep. 224] (S.D. Tex. 1997).

[125] Awada v. University of Cincinnati, 680 N.E.2d 258 [118 Educ. L. Rep. 1139] (Ohio Ct. Cl. 1997).

[126] Loving v. Boren, 956 F. Supp. 953 [117 Educ. L. Rep. 169] (W.D. Okla. 1997).

[127] Harrington v. Harris, 118 F.3d 359 [119 Educ. L. Rep. 817] (5th Cir. 1997).

In Minnesota, a university chancellor appealed the denial of his motion for summary judgment in a suit filed by professors and students who claimed that he violated their First Amendment rights by having their photographs removed from a display in the history department. The chancellor had the photographs of the professors, who were depicted holding weapons representing the period of history in which they specialized, removed due to unrelated incidents on campus that created a threatening environment. After the Eighth Circuit reversed in favor of the Chancellor,[128] an en banc panel reversed in favor of the professors and students.[129] According to the court, a reasonable chancellor should have known that such First Amendment rights were clearly established. Further, the court denied the chancellor's request for qualified immunity.

A university in the Nation's Capitol challenged a jury award of back pay in favor of a former nontenured faculty member who alleged that his wrongful discharge violated the First Amendment. The Circuit Court for the District of Columbia reduced the award of back pay and affirmed the denial of the plaintiff's request for reinstatement.[130] The court ruled that the faculty member was not entitled to either beyond the term of his contract where there was evidence that it was not going to be extended.

Nonrenewal of Contract

The Supreme Court of Virginia affirmed that a faculty member did not acquire permanent tenure after receiving a number of one-year contracts.[131] Similarly, where a professor filed a section 1983 suit in state court claiming that the university violated title VII in not reappointing him, the state court had the suit moved to a federal district court in Alabama.[132] The court granted the university's motion for summary judgment on the title VII claim on the basis that the university's failure to follow its procedures in considering the professor's reappointment did not create a constitutionally protected property interest entitling professor to a reason for its action.

Defacto Tenure

A faculty member in Maryland unsuccessfully filed suit claiming that she acquired defacto tenure when the university failed to review her for tenure. An appellate court affirmed that unless they were expressly incorporated in her contract, the version of the tenure policies existing at the time that the faculty member was hired were not part of her contract.[133] Additionally, the court posited that the theories of defacto tenure or the reasonable expectation of continued employment were not available since the university had specific tenure policies.

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[128] Burnham v. Ianni, 98 F.3d 1007 [113 Educ. L. Rep. 564] (8th Cir. 1996).

[129] Burnham v. Ianni, 113 F.3d 668 [120 Educ. L. Rep. 124] (8th Cir. 1996).

[130] Pratt v. University of D.C., 691 A.2d 158 [117 Educ. L. Rep. 212] (D.C. 1997).

[131] Tuomala v. Regent Univ., 477 S.E.2d 501 [113 Educ. L. Rep. 1337] (Va. 1996).

[132] Boyett v. Troy State Univ. at Montgomery, 971 F. Supp. 1403 [120 Educ. L. Rep. 722] (M.D. Ala. 1997).

Breach of Contract

A nontenured faculty member appealed a grant of summary judgment in favor of the university in his suit alleging breach of contract, defamation, age discrimination, and other state claims. The Supreme Court of North Dakota affirmed in favor of the university since the faculty member failed to exhaust administrative remedies before seeking judicial review.[134]

In North Carolina, a probationary faculty member challenged the dismissal of his section 1983 and state constitutional claims when he was not reappointed. An appellate court affirmed that the faculty member's claim was without merit because he lacked a property right to his position.[135]

A nontenured faculty member in Idaho disputed a grant of summary judgment in favor of the college when his contract was not renewed. An appellate court affirmed that the college did not breach the faculty member's contract by notifying him that it would not be renewed prior to his annual performance evaluation.[136] The court also reflected that the faculty member was not entitled to the protection of the First Amendment when he spoke out about the nonrenewal of his contract since this was a matter of personal interest.

In Maryland, a university disputed a jury verdict in favor of two professors whose contracts were not renewed. The problem arose when the director of a unit of the university's medical school made verbal promises to the faculty members that tenure would eventually accompany their appointments as full professors after the review process was completed and they executed one-year contracts. However, insofar as problems arose in the relationships between the professors and other members of their unit, their one-year contracts were not renewed prior to completion of the tenure review process. An appellate court reversed in favor of the university.[137] The court acknowledged that the unit director lacked the authority to bind the university to an assurance of tenure or to reduce the review process to a mere formality.

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[133] Marriott v. Cole, 694 A.2d 123 [118 Educ. L. Rep. 1065] (Md. Ct. Spec. App. 1997).

[134] Long v. Samson, 568 N.W.2d 602 [120 Educ. L. Rep. 1165] (N.D. 1997).

[135] Ware v. Fort, 478 S.E.2d 218 [114 Educ. L. Rep. 671] (N.C. Ct. App. 1996).

[136] Totman v. Eastern Idaho Technical College, 931 P.2d 1232 [116 Educ. L. Rep. 429] (Idaho Ct. App. 1997).

[137] Johns Hopkins Univ. v. Ritter, 689 A.2d 91 [116 Educ. L. Rep. 669] (Md. Ct. Spec. App. 1996).

An associate professor whose one-year contract was not renewed sought further review of a grant of summary judgment in favor of the university when he sued for breach of contract after claiming that he did not receive the timely notice called for in the agreement. An appellate court in Georgia affirmed in favor of the university.[138] The court reflected that the faculty member refused to accept a timely letter that the university sent him by certified letter informing him of the nonrenwal of his contract.

In Texas, a faculty member claimed he was removed from the tenure track in retaliation for his involvement with a merit pay increase committee. He challenged a grant of summary judgment in favor of the administrators and was partially sucessful.[139] The court was of the opinion that the administrators were not entitled to summary judgment based on official immunity since the faculty member raised material issues of fact and incompetence or willful violations of the law surrounding their actions. However, the court affirmed that the faculty member could not recover for tortious interference with an employment contract.

Termination During Contract Period

In Massachusetts, a nontenured faculty member who was dismissed during his contract for allegedly sexually harassing students sued his university for breach of contract, disability discrimination, defamation, and invasion of privacy. The faculty member argued that since his mental disabilities left him unable to teach, the university should have accommodated him by allowing him to remain in his position but not have to perform instructional duties. The federal district court granted the university's motion for summary judgment.[140] The court ascertained that by the plaintiff's own arguments, he was not qualified to fill the teaching position from which he had been dismissed. As such, the court offered that the university was not liable for breach of contract. In addition, the court believed that the university had not defamed the faculty member by submitting public filings to the court and that his invasion of privacy claim was barred by absolute privilege.

Two nontenured faculty members in Oklahoma appealed a grant of summary judgment in favor of the university when they sued under section 1983 alleging violations of due process and First Amendment speech when their contracts were not renewed. The Tenth Circuit affirmed that the plaintiffs had no property interest under state law or that university procedural guidelines entitled them to due process.[141] The court added that the faculty members' pronouncements about grievance procedures were neither matters of public concern nor protected speech that were covered by the First Amendment.

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[138] Dorsey v. Clark Atlanta Univ., 481 S.E.2d 848 [116 Educ. L. Rep. 820] (Ga. Ct. App. 1997).

[139] Dalrymple v. University of Tex. Sys., 949 S.W.2d 395 [120 Educ. L. Rep. 354] (Tex. Ct. App. 1997).

[140] Motzkin v. Trustees of Boston Univ., 938 F. Supp. 983 [113 Educ. L. Rep. 606] (D. Mass. 1996).

Discrimination

In Louisiana, a faculty member sued his university for retaliation under the ADEA when it refused to reconsider his grievance over the nonrenewal of his contract after officials told him that they ceased reviewing his charge since he filed a complaint with the EEOC. In granting the university's motion for summary judgment, a federal trial court decreed that the 180-day filing period began when it notified the faculty member by letter that it would not adjudicate his grievance, not two years later when it refused to reconsider its decision to do so.[142]

A nontenured faculty member in Pennsylvania unsuccessfully filed section 1981, section 1983, and title VII race discrimination claims against his university when his contract was not renewed. A federal district court contended that the former faculty member failed to establish substantive due process, due process, or conspiracy to interfere with civil rights and that he was unable to show that the university's proffered reasons for the nonrenewal of his contract were a pretext for discrimination.[143]

In the District of Columbia, an assistant professor sued his university for national origin and gender discrimination when her one-year contract was not renewed.[144] The federal district court found that the plaintiff failed to establish a prima facie case of national origin discrimination when the male employee she used as a foreign-born comparator was an United States citizen who was born in the Canal Zone. In addition, the court asserted that the male was not similarly situated for purposes of a gender discrimination claim since he had been at the university longer and was certified by the board.

Where a faculty member in Alabama whose contract was not renewed sued under section 1983 and the ADEA, a federal district court partially granted the university's motion for summary judgment.[145] Primarily addressing the constitutional claims, the court declared that the faculty handbook did not require all nonrenewal actions to be for cause, that the plaintiff's perceived right to notice and a hearing did not establish substantive due process rights, and that the university's nonrenewal policies did not establish a property right. The court concluded that the faculty member's speech surrounding his claim of retaliatory discharge was not protected as it was not on a matter of public concern.

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[141] Bunger v. University of Okla. Bd. of Regents, 95 F.3d 987 [112 Educ. L. Rep. 84] (10th Cir. 1996).

[142] Odaivappa v. Board of Supervisors of La. State Univ., 933 F. Supp. 575 [112 Educ. L. Rep. 128] (E.D. La. 1996).

[143] Elmore v. Clarion Univ. of Pa., 933 F. Supp. 1237 [112 Educ. L. Rep. 1237] (M.D. Pa. 1996).

[144] Slaughter v. Howard Univ., 971 F. Supp. 613 [120 Educ. L. Rep. 686] (D.D.C. 1997).

Denial of Tenure

Procedural Issues

In a case from Kentucky, the Sixth Circuit refused to hear a denial of tenure action. The court based its judgment on *Younger v. Harris*,[146] which requires the federal judiciary to abstain from exercising its jurisdiction where doing so would not only supersede an important state interest but would also enjoin pending state proceedings.[147]

In Minnesota, an assistant professor who was denied tenure sought disclosure of documents used in the process under the Government Data Practices Act.[148] On further review of a partial grant of summary judgment in favor of the university, an appellate court acknowledged that a draft of a letter reviewed by its legal counsel notifying the faculty member of the result was not covered by the attorney-client privilege. However, the court determined that further findings were necessary to evaluate whether a memorandum from the provost to the attorney about the controversy was covered by attorney-client privilege.

Where a nontenured law professor filed a petition for judicial review of an administrative adjudication denying him tenure, an appellate court in Louisiana affirmed that it lacked jurisdiction over the dispute.[149] The court agreed that the tenure process was not a rules decision or order subject to review under the state's Administrative Procedures Act.

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[145] Boyett v. Troy State Univ. at Montgomery, 971 F. Supp. 1403 [120 Educ. L. Rep. 722] (M.D. Ala. 1997).

[146] 401 U.S. 37 (1971).

[147] Hayse v. Wethington, 110 F. 3d 18 [117 Educ. L. Rep. 111] (6th Cir. 1997).

[148] Kobluk v. University of Minn., 556 N.W. 2d 573 [114 Educ. L. Rep. 943] (Minn. Ct. App. 1996).

[149] Jones v. Southern Univ. & A&M College Sys. *ex rel.* Bd. of Supervisors, 693 So. 2d 1265 [118 Educ. L. Rep.798] (La. Ct. App. 1997).

Tenure Review Process

A former faculty member who was denied tenure claimed that the university's alleged assurance that poor student evaluations of his teaching would not affect its decision was negligent misrepresentation. Relying on a promise from the dean, the plaintiff resigned from a teaching position at a community college where he was on leave and accepted a job at the university. Based on an analysis of the contractual relationship between the parties, the Supreme Court of Oregon held that the university did not owe the professor a duty to avoid negligent misrepresentation.[150]

A faculty member in Washington D.C. appealed a grant of summary judgment in favor of the university after he claimed that the university did not follow the procedures in his handbook by giving him timely notice that it was denying him tenure. The District of Columbia Court of Appeals reversed in favor of the faculty member.[151] The court indicated that the handbook did not unambiguously support the university's interpretation that it met the notice provisions.

In Texas, a nontenured professor sued a university and various officials claiming that she was denied procedural and substantive due process when her contract was terminated. A federal district court denied the university's motion for summary judgment since there were material issues of fact over the professor's procedural due process, substantive due process, and de facto tenure claims.[152] However, the court granted the university's motion for summary judgment since the conduct of officials during the tenure review and contract negotiations was reasonable and the nonrenewal of the faculty member's contract did not deprive her of a liberty interest. Similarly, an appellate court in North Carolina affirmed that a faculty member's mere allegation of the denial of tenure was not sufficient to allege breach of contact.[153] The court was of the opinion that the faculty member had no property right claim to tenure and that his reliance on the university's implied promise did not sustain a state fraud claim.

Both parties in New York sought further review where a faculty member who was denied tenure sued the university for breach of contract, estoppel, and fraudulent misrepresentation. An appellate court affirmed that the breach of contract claim, which was based on the provost's memo that seventy-five percent tenure rule would not be applied in this situation, was valid.[154] Further, the court precluded the university's motion for summary judgment since there were material issues of fact surrounding its waiver of using program needs as the basis for tenure decisions. However, the court added that promissory or equitable estoppel did not entitle the faculty member to tenure and that he was unable to maintain his fraud claim.

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[150] Conway v. Pacific Univ., 924 P.2d 818 [113 Educ. L. Rep. 942] (Or. 1996).

[151] Kakaes v. George Washington Univ., 683 A.2d 128 [113 Educ. L. Rep. 823] (D.C. 1996).

[152] Owens v. Board of Regents of Tex. Southern Univ., 953 F. Supp. 781 [116 Educ. L. Rep. 621] (S.D. Tex. 1996).

[153] Claggett v. Wake Forest Univ., 486 S.E.2d 443 [119 Educ. L. Rep. 280] (N.C. Ct. App. 1997).

In Louisiana, a faculty member who was denied tenure challenged a grant of summary judgment in favor of his university. An appellate court affirmed that the terms and conditions outlined in the faculty handbook did not breach the professor's employment contract.[155]

Civil Rights Violations

As the following cases reflect, faculty members who were denied tenure filed a variety of claims alleging that their constitutional rights were violated.

First Amendment

University administrators in Alabama appealed the partial denial of their motion to dismiss a section 1983 claim alleging that they violated the free speech rights of a faculty member who was denied tenure. The Eleventh Circuit reversed and dismissed in favor of the administrators.[156] The court maintained that the faculty member's criticisms of an administrator's textbook were not sufficiently clearly a matter of public concern that a reasonable official would understand that speech was being suppressed in violation of the First Amendment.

A faculty member in Pennsylvania claimed that statements he made about storing and removing hazardous materials from a laboratory he was going to occupy led to the denial of his application for tenure. The department, after recommending the faculty member for tenure, reconsidered its decision since he persisted in complaining about the inadequacy of the cleanup of the contaminated laboratory. A federal district court in Pennsylvania partially granted the university's motion for summary judgment.[157] The court mandated that the faculty member's breach of contract claims would be left under his collective bargaining agreement's grievance procedures and that statements made by officials during the tenure review process were not subject to a defamation action because they were protected by absolute privilege. However, the court observed that since the faculty member's pronouncements about the laboratory contamination were protected speech under the First Amendment, further adjudication was necessary.

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[154] Roufaiel v. Ithaca College, 660 N.Y.S.2d 595 [120 Educ. L. Rep. 234] (N.Y. App. Div. 1997).

[155] Schwarz v. Administrators of the Tulane Educ. Fund, 699 So.2d 895 [121 Educ. L. Rep. 440] (La. Ct. App. 1997).

[156] Williams v. Alabama State Univ., 102 F.3d 1179 [114 Educ. L. Rep. 1056] (11th Cir. 1997).

[157] Bloch v. Temple Univ., 939 F. Supp. 387 [113 Educ. L. Rep. 693] (E.D. Pa. 1996).

Title VII

In New Jersey, a faculty member who was denied tenure sued a university claiming racial, sexual, and religious discrimination under title VII.[158] The faculty member, a Jewish female, charged that statements and practices of her male African-American department head violated title VII by resulting in discrimination against whites and Jews. The court noted that the faculty member was not required to exhaust administrative remedies on the allegations that the reconsideration of the dean's denial of her request for tenure was based on the same discriminatory reasons asserted in her EEOC charge.

A faculty member in Colorado who was denied tenure sued claiming that the college violated his rights under sections 1981 and 1983 as well as under title VII. After the disposition of the sections 1981 and 1983 claims, a jury awarded the professor damages for back pay and emotional distress.[159]

In Alabama, a federal district court denied a university's motion for summary judgment on a title VII claim filed by a faculty member who was denied tenure.[160] The court pointed out that there were material issues of fact in need of resolution over the faculty member's title VII claim of retaliation for filing a sexual harassment complaint.

Age Discrimination

A medical school professor in Louisiana who was denied tenure unsuccessfully filed charges of age and race discrimination. A federal district court granted the university's motion for summary judgment in positing that the sixty-one-year-old research professor, who had not been hired on the tenure track, did not have a claim to tenure or could not raise discrimination charges when he was dismissed after the grant he was working on expired.[161]

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[158] Schanzer v. Rutgers Univ., 934 F. Supp. 669 [112 Educ. L. Rep. 229] (D.N.J. 1996).

[159] Thornton v. Kaplan, 958 F. Supp. 502 [117 Educ. L. Rep. 611] (D. Colo. 1996).

[160] Morrow v. Auburn Univ. at Montgomery, 973 F. Supp. 1392 [121 Educ. L. Rep. 107] (M.D. Ala. 1997).

[161] Bernofsky v. Tulane Univ. Med. Sch., 962 F.Supp. 895 [118 Educ. L. Rep. 625] (E.D. La. 1997).

Title IX

A faculty member in Maine who was denied tenure brought a retaliation claim based on his support of a student's claims of sexual harassment under title IX.[162] A jury awarded the faculty member compensatory and punitive damages. However, the court reduced the amount of attorney fees that the faculty member could recover based on the excessive number of hours that the lawyer claimed to have worked. At the same time, the court stated that the faculty member was ineligible for back pay and that his failure to mitigate damages disqualified him from seeking reinstatement and front pay.

Part-Time Faculty

A university challenged a ruling in favor of a faculty member who was working on a series of one-year contacts. After the university failed to offer the faculty member a contract because the program that he taught in was moved to another department, a jury entered a verdict in his behalf. An appellate court in Texas reversed in favor of the university.[163] The court reflected that the University System and its board of regents had sovereign immunity on the claims of federal and state due process violations and the charges of tortious detrimental reliance.

Tenured Faculty

Termination for Cause

A professor unsuccessfully brought section 1983 free speech and due process claims against his university when he was terminated for cause. After a hearing, the university terminated the professor's contract because he violated its sick leave policy and failed to meet his teaching responsibilities.[164] The Supreme Court of Alabama affirmed that even though a panel of lay persons could not adequately determine the merits of his constitutional claim, the professor waived his right to relitigate the issue by failing to seek further review by an appeals panel.[165]

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[162] Nelson v. University of Me. Sys., 944 F. Supp. 44 [114 Educ. L. Rep. 506] (D. Me. 1996).

[163] University of Tex. Sys. v. Courtney, 946 S.W.2d 464 [118 Educ. L. Rep. 1232] (Tex. Ct. App. 1997).

[164] Smith v. Alabama Aviation & Technical College, 683 So. 2d 431 [114 Educ. L. Rep. 990] (Ala. Civ. App.1996).

[165] *Ex parte* Smith, 683 So. 2d 431 [114 Educ. L. Rep. 990] (Ala. 1996).

In a second case from Alabama, a professor who was incarcerated after being convicted of a felony challenged the university's termination of his contract. An appellate panel denied the faculty member's mandamus petition insofar as he failed to establish that his constitutional rights were violated when a trial court failed to order a final judgment in his favor.[106]

Rather than face charges of enrollment fraud, tenured faculty members who resigned sought further review of a grant of summary judgment in favor of their community college. An appellate court in Illinois affirmed in favor of the college.[107] The court ruled that the college established a prima facie basis for the discharge since the resignations were not coerced even if college officials incorrectly thought that enrollment fraud was a federal crime.

A male faculty member who was dismissed for allegedly sexually harassing students sued his college. The federal trial court in Minnesota partially granted the college's motion for summary judgment since the faculty member did not have a private right of action or right to due process under title IX.[108] However, the court left the professor's breach of contract claim intact.

Denial of Employee Privileges

Claims in this area involved merit pay, access to duties defined in a contract, and promotion. A former department head who charged that he was forced out of the job because he pursued a research fraud claim against a professor in his department filed a variety of allegations against the university. A federal district court in Texas partially granted the university's motion for summary judgment because the two-year statute of limitations applied to the former department head's title VII and ADA claims and he did not have a property right in his teaching assignment.[109] The court added that the equitable tolling doctrine was unavailable as applied to the statute of limitations for a section 1983 claim since individual defendants were entitled to qualified immunity. Finally, the court reasoned that the former department head's claim under the Whistleblowers Act was barred by the statute of limitations, that negligent infliction of emotional distress was not cognizable, and that the dean had qualified immunity and qualified privilege in the defamation claim.[110]

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[106] *Ex parte* Grayson, 698 So. 2d 790 [120 Educ. L. Rep. 1251] (Ala. Civ. App. 1997).

[107] Allen v. Board of Trustees of Community College Dist. Number 508, 675 N.E.2d 187 [115 Educ. L. Rep. 999] (Ill. App. Ct. 1996).

[108] Cooper v. Gustavus Adolphus College, 957 F. Supp. 191 [117 Educ. L. Rep. 182] (D. Minn. 1997).

[109] Wagner v. Texas A & M Univ., 939 F. Supp. 1297 [113 Educ. L. Rep. 763] (S.D. Tex. 1996).

[110] Wozniak v. Conry, 679 N.E.2d 1255 [119 Educ. L. Rep. 584] (Ill. App. Ct. 1997).

An associate professor in Illinois filed allegations of tortious interference with his contract when he was removed from teaching and placed in charge of the department's web page on the World Wide Web. The department head acted after receiving allegations that the professor failed to comply with departmental course standards, assignment policies, and examination and grading policies; the chair also received information that the professor sexually harassed a female employee. After a trial court dismissed the claim for lack of jurisdiction, the professor sought further review. An appellate tribunal in Illinois affirmed that the trial court was the only forum for the adjudication of this claim.

The first of three cases dealing with faculty promotions arose in Texas where an associate professor claimed she was denied full professor because of her gender and in retaliation for bringing an administrative complaint and a lawsuit. The complaint and suit resulted from an audit which uncovered that she had been improperly paid from a federal grant. After a federal trial court entered judgment in favor of the faculty member, the university appealed. The Fifth Circuit reversed on the ground that the university's valid reasons for not promoting the faculty member, her inadequate research and publications record, did not amount to discrimination based on gender.[171] The court also believed that the university did not act out of retaliation.

In a second case from Texas, an associate professor claimed he was denied a promotion in retaliation for his comments about university and department policies. A federal district court was of the view that the existence of his comments alone would not sustain a First Amendment claim and that the university provided valid job related reasons for denying the promotion.[172] In addition, the court offered that procedural irregularities in the decision-making process did not violate due process and that disability discrimination charges emanating from the faculty member's past alcoholism did not enter into the university's judgment.

A faculty member in Wisconsin unsuccessfully claimed that he was denied a promotion and pay increases because of national origin discrimination. The Seventh Circuit affirmed in favor of the university.[173] The court agreed that the faculty member failed to demonstrate that the university's proffered reasons for the denial were a pretext for discrimination.

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[171] Travis v. Board of Regents of the Univ. of Texas Sys., 122 F.3d 259 [120 Educ. L. Rep. 922] (5th Cir. 1997).

[172] Curtis v. University of Houston, 940 F. Supp. 1070 [113 Educ. L. Rep. 1145] (S.D. Tex. 1996).

[173] Dasgupta v. University of Wis. Bd. of Regents, 121 F.3d 1138 [120 Educ. L. Rep. 664] (7th Cir. 1997).

All Employees

Collective Bargaining

Bargaining Unit Designation

When a public college converted what had been an academic position into an administrative job as part of a reorganization plan, a union filed a grievance with the state Labor Relations Board on behalf of a faculty member denied a third-year appointment. The board rejected the grievance but acknowledged that under the collective bargaining agreement, the faculty assembly had the right to review and approve the reorganization of academic programs. On further review, the Supreme Court of Vermont affirmed not only that the faculty member had limited grievance rights during the first four years of his academic appointment, but also that the agreement gave the faculty assembly the right to review the reorganization of the program.[174]

At issue in Ohio was whether department chairs were members of a faculty bargaining unit. When the State Employment Relations Board dismissed the university's clarification petition, it sought judicial review. An appellate tribunal reversed on the basis that a trial court erred in interpreting the administrative code.[175] The panel ascertained that the trial judge should have allowed the board to determine whether it had jurisdiction to consider the university's petition as prescribed under the administrative code.

Unfair Labor Practices

After the collective bargaining agreement between support personnel and a state university system expired, the university suspended payment of merit salary adjustments. The Public Employment Relations Board rejected an Administrative Law Judge's finding that this was not an unfair labor practice and denied the union's request for reconsideration. On further review, an appellate court in California decided that suspending the MSAs without giving the union notice was more than an isolated breach of the expired agreement since the union had not waived its right to negotiate on this issue.[176] The court wrote that the expired agreement required the university to make the salary adjustments even absent appropriation by the state legislature.

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[174] *In re* Murray, 689 A.2d 463 [116 Educ. L. Rep. 709] (Vt. 1997).

[175] Shawnee State Univ. v. State Employment Relations Bd., 673 N.E.2d 600 [114 Educ. L. Rep. 933] (Ohio Ct. App. 1996).

[176] California State Employees' Ass'n v. Public Employment Relations Bd., 59 Cal. Rptr.2d 488 [114 Educ. L. Rep. 894] (Cal. Ct. App. 1996).

Grievance Procedures

A community college appealed a modification in favor of an employee that it dismissed for insubordination. The Court of Appeals of New York reversed.[177] The court ruled that since service of the arbitration award to union representatives was effective on the former employee, the ninety-day period for an appeal began on the day that the union received notice of the award. As such, the court concluded that the former employee's appeal was untimely.

In a second case from New York, a community college disputed a grievance that was resolved in favor of a faculty member it dismissed because he lacked appropriate academic credentials. An appellate court found that the grievance could not be upheld because the faculty member did not have the proper credentials.[178]

Where a medical records employee was dismissed after a mail-in postcard campaign and a traffic incident resulted in his suspension, his union challenged the Illinois Employment Labor Relations Board's adjudication that the university did not violate state law. An appellate court reversed in favor of the union.[179] The court indicated that the board deprived the union of due process by acting arbitrarily and capriciously in rejecting its claim of discriminatory discharge.

In Minnesota, a faculty association unsuccessfully tried to compel the university system to arbitrate its refusal to recognize faculty appointments.[180] An appellate court affirmed that since the appointment was not authorized by the agreement between the parties, the issue required the interpretation of merger legislation involving the state system of higher education.

Breach of Contract

Employees in the District of Columbia who lost their jobs as part of a reduction-in-force (RIF) brought a hybrid claim against the university and their union.[181] A federal district court decreed that the union's failure to process the grievance was not a breach of its duty of fair representation. The court added that the employees' breach of contract claim against the university could not stand since they did not prevail in their charge against the union.

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[177] Case v. Monroe Community College, 654 N.Y.S.2d 708 [116 Educ. L. Rep. 1102] (N.Y. 1997).

[178] Meehan v. Nassau Community College, 647 N.Y.S.2d 865 [113 Educ. L. Rep. 387] (N.Y. App. Div. 1996).

[179] General Serv. Employees Union, Local 73, SEIU, AFL-CIO, CLC v. Illinois Educ. Labor Relations Bd., 673 N.E.2d 1084 [115 Educ. L. Rep. 389] (Ill. App. Ct. 1996).

[180] Minnesota Community College Faculty Ass'n v. State, 562 N.W.2d 685 [118 Educ. L. Rep. 477] (Minn. Ct. App. 1997).

[181] Coble v. Howard Univ., 960 F. Supp. 1 [118 Educ. L. Rep. 178] (D.D.C. 1997).

Administration and Staff

Termination

The courts were actively involved in resolving disputes involving administrators and staff this year. Jurisdictional, procedural, property rights, discrimination, hiring, breach of contract, and financial exigencies were among the issues that were litigated.

Jurisdiction

A former nonclassified employee of a Board of Governors who was dismissed by the Commissioner unsuccessfully appealed to the state Personnel Appeal Board. On further review, the Supreme Court of Rhode Island affirmed a grant of summary judgment in favor of the Board of Governors.[182] According to the court, the Personnel Appeal Board lacked jurisdiction over the dispute since it was under the exclusive control of the Commissioner.

A university employee who reached an out-of-court settlement in his federal claim over an unfavorable evaluation challenged her inability to file a grievance, or file a state action, when she did not receive a salary increase because of the same unfavorable evaluation. The Supreme Court of Alaska affirmed that since the same evaluation was at issue in both cases, the state claim was barred by res judicata.[183]

Procedural Questions

A university board of trustees appealed a decision of the State Employees Grievance Board that reversed its dismissal of a male employee who entered a women's locker room. The employee claimed that he mistakenly entered the women's locker room because of poor lighting and an inadequate sign. The Supreme Court of Appeals of West Virginia affirmed that the use of a criminal trespass conviction based on a no contest plea was inadmissible to show intent in a grievance.[184]

In California, a former employee sought further review of the denial of his request to amend his complaint in his wrongful dismissal suit. An appellate court reversed on the basis that the former employee should have been allowed to amend his complaint and allowed to bring a common law claim for wrongful termination in violation of public policy.[185]

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[182] Rhode Island Bd. of Governors for Higher Educ. v. Newman, 688 A.2d 1300 [116 Educ. L. Rep. 340] (R.I. 1997).

[183] Plumber v. University of Alaska—Anchorage, 936 P.2d 163 [117 Educ. L. Rep. 1122] (Alaska 1997).

[184] University of W. Va. Bd. of Trustees v. Fox, 475 S.E.2d 91 [112 Educ. L. Rep. 498] (W. Va. 1996).

Property Rights/Due Process

Where a campus police officer was suspended after being arrested and charged with drug related crimes, a federal trial court granted the university's motion for summary judgment when he claimed that his due process rights had been violated. After the Third Circuit reversed and ordered a pre-suspension hearing, the university appealed. In *Gilbert v. Homar*,[186] the Supreme Court reversed and held that the suspended police officer was not entitled to a pre-suspension hearing. The Court noted that under a state executive order, public employees who are charged with felonies were automatically suspended without pay as long as they received a sufficiently prompt post-suspension hearing. As such, the Court remanded for a determination of whether the hearing was sufficiently timely.

A community college disputed the partial denial of its motion for summary judgment in a suit filed by its former president which alleged that it violated his Fourteenth Amendment and due process rights. A federal trial court in Illinois granted the college's motions on the president's defamation and tortious interference claims since board members had absolute immunity.[187] On further review, the Seventh Circuit affirmed that the former president's due process, section 1983, breach of contract, and breach of duty of good faith and fair dealing claims could proceed.[188]

In a case from Michigan, the Sixth Circuit affirmed the dismissal of a former men's basketball coach's section 1983 action against his university.[189] The university released the coach, who was an at-will employee, after an investigation uncovered evidence that he discriminated against one of his players based on national origin. The court rejected the coach's argument that the university deprived him of his right to due process in the way it conducted the investigation when it contended that he did not have such a right because, as an at-will employee, he did not have a property interest in continued pay and benefits.

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[185] Bayley v. Regents of the Univ. of Cal., 67 Cal. Rptr. 2d 707 [120 Educ. L. Rep. 1122] (Cal. Ct. App. 1997).

[186] 117 S.Ct. 1807 [118 Educ. L. Rep. 590] (U.S. 1997).

[187] Bakalis v. Board of Trustees of Community College Dist. No. 504, 948 F. Supp. 729 [115 Educ. L. Rep. 739] (N.D. Ill. 1996); *See also* Bakalis v. Board of Trustees of Community College Dist. No. 504, No. 93 C 0483, 1993 WL 528084 (N.D. Ill. 1993), *aff'd*, Bakalis v. Golembeski, 35 F.3d 318 (7th Cir. 1994).

[188] Bakalis v. Golembeski, 125 F.3d 576 [121 Educ. L. Rep. 66] (7th Cir. 1997).

[189] Ludwig v. Board of Trustees of Ferris State Univ., 123 F.3d 404 [120 Educ. L. Rep. 975] (6th Cir. 1997).

Where a former head women's basketball coach and his assistant, neither of whom had written contracts, were fired for alleged NCAA violations, they filed suit claiming that the college ignored their rights to procedural due process by failing to give them notice or a hearing before their dismissals. A federal district court in Georgia granted the college's motion for summary judgment.[190] The court mandated that as at-will employees who had no constitutionally protectable property interest in their jobs, the coaches were not entitled to due process.

Discrimination

In Massachusetts, a former employee appealed a grant of summary judgment in favor of his university when he sued it under title VII for discrimination based on race and national origin. The First Circuit affirmed that evidence was insufficient to support the claims since statements that a professor made about the discriminatory behavior of the employee's supervisor were hearsay.[191] The court added that the former employee's perception of discriminatory treatment was insufficient because it was not supported by substantive evidence of the supervisor's discriminatory intent.

A black employee missed work to participate in the Million Man March unsuccessfully claimed that his educational employer violated section 1981 and the District of Columbia Human Rights Act. The federal trial court granted the institution's motion for summary judgment since the employee's participation in the march was not a statutorily protected activity.[192] The same court also granted a university's motion for summary judgment in a claim by a female employee who claimed that her poor performance evaluations were a pretext for sex discrimination.[193] The court noted that the university substantiated reasons for its action and the former employee failed to provide evidence that it was motivated by gender discrimination. Conversely, the federal district court in New Hampshire rejected a college's motion for summary judgment when the female head of one of its service departments alleged sexual discrimination and retaliation.[194] The court maintained that material issues of fact existed as to whether the employee's constructive discharge was in retaliation for her having filed a title VII claim.

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[190] Wallace v. Board of Regents of the Univ. Sys. of Ga., 967 F. Supp. 1287 [119 Educ. L. Rep. 494] (S.D. Ga. 1997).

[191] Pilgrim v. Trustees of Tufts College, 118 F.3d 864 [120 Educ. L. Rep. 53] (1st Cir. 1997).

[192] Beckwith v. Career Blazers Learning Ctr. of Washington, D.C., 946 F. Supp. 1035 [114 Educ. L. Rep. 1083] (D.D.C. 1996).

[193] Randall v. Howard Univ., 941 F. Supp. 206 [113 Educ. L. Rep. 1197] (D.D.C. 1996).

[194] Hart v. University Sys. of N.H., 938 F. Supp. 104 [113 Educ. L. Rep. 252] (D.N.H. 1996).

A university employee in the District of Columbia filed a section 1981 claim of racial discrimination when she was not promoted and later dismissed after her position was eliminated. The federal district court granted the university's motion for summary judgment because the woman could not rebut its valid, nondiscriminatory reasons.[195] Similarly, a counselor in Texas unsuccessfully alleged racial discrimination and retaliation. A federal district court granted the community college's motion for summary judgment insofar as it had nondiscriminatory reasons in not promoting and reassigning the counselor.[196] The court also observed that the counselor lacked a protectible property or liberty interest in her original job assignment.

In New York, a federal district court partially granted motions from a dean and his law school dismissing title VII, section 1981, and state law claims filed by an African-American male who charged that he was discriminated against when he was fired and replaced by a white male who earned a higher salary. The court was of the opinion that the dean was not individually liable under title VII and that his retaliation claim was not reasonably related to title VII.[197] The court also stated that the Eleventh Amendment barred the former employee's section 1981 claim against the school and the dean in her official capacity. However, the court posited that the employee could sue the dean for reinstatement and, if successful, recover damages.

Where a medical school dismissed a public relations officer over a report that contained major errors, he filed suit claiming race and disability discrimination, breach of contract, and defamation. The federal district court in New Jersey granted the university's motion for summary judgment since the employee's failure to exhaust administrative remedies barred his ADA claim.[198] In addition, the court was of the view that the public relations officer failed to establish a prima facie case of disability or reverse race discrimination and that the employer's handbook had not created an implied contract for at-will employees.

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[195] Carney v. American Univ., 960 F. Supp. 436 [118 Educ. L. Rep. 194] (D.D.C. 1997).

[196] Mosley v. Houston Community College Sys., 951 F. Supp. 1279 [116 Educ. L. Rep. 200] (S.D. Tex. 1996).

[197] Chinn v. City Univ. of N.Y. Sch. of Law at Queens College, 963 F. Supp. 218 [118 Educ. L. Rep. 653] (E.D.N.Y. 1997).

[198] Ditzel v. University of Med. & Dentistry of N.J., 962 F. Supp. 595 [118 Educ. L. Rep. 899] (D.N.J. 1997).

An African-American food service employee who was not hired to a permanent position after serving a probationary period unsuccessfully filed an EEOC claim of racial discrimination. The federal district court in New Hampshire partially granted the university's motion for judgment on the pleadings because the employee failed to exhaust administrative remedies when she did not state a claim for sex discrimination in her EEOC complaint.[199] Moreover, the court pointed out that since the employee was not a student, she could not sustain a title IX claim against the college and its dining services. At the same time, the court agreed with the woman that she stated a claim for intentional interference with contractual relationship based on her supervisor's derogatory and offensive remarks.

In Indiana, a former assistant football coach unsuccessfully alleged age discrimination and defamation when he was dismissed. A federal trial court ruled that the head coach's comments about the assistant's inability to perform the physical tasks required of him were not defamation per se and that he had not established actual malice on the part of the university or the head coach necessary to prevail in a defamation per quod claim.[200]

A former assistant women's basketball coach in Ohio unsuccessfully claimed that the university discriminated against her due to gender and race in forcing her to resign because she allegedly violated NCAA regulations. An appellate court affirmed a judgment in favor of the university.[201] The court reflected that the coach failed to establish a prima facie case of discrimination because she could not show that the university replaced her or retained another person who was not in a protected class. The court also acknowledged that even if the coach could establish a prima facie case, she did not show that the university's reason for terminating her contract was a mere pretext for discrimination.

Retaliation

In the first of five cases involving allegations of retaliatory employment action, the Supreme Judicial Court of Massachusetts affirmed the general rule that an at-will employee who is discharged for reporting criminal activity can recover damages.[202] However, the court also agreed that since the former employee failed to create genuine issues of material fact that she was fired for reporting criminal activity, the college she worked for and her supervisor were entitled to a grant of summary judgment.

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[199] Preyer v. Dartmouth College, 968 F. Supp. 20 [119 Educ. L. Rep. 853] (D.N.H. 1997).

[200] Moore v. Univ. of Notre Dame, 968 F. Supp. 1330 [119 Educ. L. Rep. 935] (N.D. Ind. 1997).

[201] McKenzie v. Wright State Univ., 683 N.E.2d 381 [120 Educ. L. Rep. 558] (Ohio Ct. App. 1996).

[202] Shea v. Emmanuel College, 682 N.E.2d 1348 [120 Educ. L. Rep. 254] (Mass. 1997).

Where a former employee of a community college alleged that her dismissal violated the state Whistleblower Statute, the trial judge believed that since the amended law, which only allowed her to recover actual damages, could not be applied retroactively, she was limited to costs and attorney's fees. On further review, an appellate court in Washington reversed in favor of the former employee.[203] The court asserted that she could recover damages retroactively.

When a former university employee who alleged that various improprieties occurred in his office was fired by his supervisor, he filed suit claiming retaliation under the False Claims Act (FCA) and breach of contract. After a jury returned a verdict for the employee on both claims, the federal trial court in the District of Columbia granted the university's motion for judgment as a matter of law since he failed to allege a claim of retaliation under the FCA.[204] At the same time, the court found that the university was liable, as a matter of law, under the theory of promissory estoppel, on the breach of contract claim because the employee reasonably relied on and followed grievance procedures outlined in the employer's handbook.

An at-will employee at a university disputed the dismissal of his claims that his wrongful discharge caused him to suffer from intentional infliction of emotional distress. An appellate court in Iowa affirmed that the employee's dismissal did not violate public policy and that the university did not breach his contract in retaliation for his having participated in an investigation.[205]

In North Carolina, a research assistant who was dismissed from a university for insubordination filed suit alleging both federal and state claims. After a federal trial court granted the university's motion for summary judgment on the federal claims, the case was remanded to state court.[206] The second court granted the university's motion for summary judgment on the state charge and a jury returned a verdict in favor of the department head on the defamation claim. On further review, an appellate court affirmed that the former employee failed to show that she was dismissed for her alleged whistleblowing.

Hiring

A community college challenged an order directing it to hire one of its employees as director of its office of financial aid. The Supreme

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[203] Bayless v. Community College Dist. No. XIX, 927 P.2d 254 [114 Educ. L. Rep. 664] (Wash. Ct. App. 1996).

[204] United States *ex rel.* Yesudian v. Howard Univ., 946 F. Supp. 31 [114 Educ. L. Rep. 1062] (D.D.C. 1996).

[205] Butts v. University of Osteopathic Med. & Health Sciences, 561 N.W.2d 838 [117 Educ. L. Rep. 727] (Iowa Ct. App. 1997).

[206] Hanton v. Gilbert, 486 S.E.2d 432 [119 Educ. L. Rep. 272] (N.C. Ct. App. 1997).

Court of Appeals of West Virginia reversed in favor of the college.[207] According to the court, college officials were free to select the candidate of their choice for the job.

Financial Exigency

Where several employees sought administrative review of the reorganization and RIF plan at their university, the State Personnel Board affirmed that the plan was arbitrary and capricious. On further review, an appellate court in Colorado reversed.[208] The court determined that while the employees could appeal to the board, the university's planning committee had established a rational basis for its reorganization and RIF plan.

An employee who was promoted to a new position failed to address the less advantageous RIF procedures attached to the new job. He sought further review of the denial of his claim that his subsequent dismissal as part of a RIF was unlawful.[209] The District of Columbia Court of Appeals affirmed that the employee's case was without merit because he failed to exhaust administrative remedies by challenging the RIF policy when he was promoted.

Contract Issues

An employee disputed a trial court's ruling that it lacked subject matter jurisdiction to hear his suit alleging that his college breached his contract and violated section 1983 when he was dismissed. An appellate court in Texas concluded that sovereign immunity blocked the employee's section 1983 race discrimination charge but not his breach of contract claim.[210]

In New York, a secretary who alleged employment discrimination and retaliation unsuccessfully tried to depose an associate dean who conducted interviews of university employees at the request of the attorney defending the institution. A federal trial court held that both the interviews and the work product document prepared from them could not be deposed because they were privileged information.[211]

The first of six cases involving breach of contract claims was filed by a prospective employee of a Department of Energy laboratory against the university that operated the facility. After a federal district court judged that the action was barred by the Eleventh Amendment, the Ninth Circuit reversed in favor of the employee. On further review in *Regents of the University of California v. Doe*,[212] the Supreme Court reversed in favor of the plaintiff. The court reasoned that the university was not divested of its Eleventh Amendment immunity because it was indemnified by the federal government for costs in an adverse judgment.

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[207] Quinn v. West Virginia N. Community College, 475 S.E.2d 405 [112 Educ. L. Rep. 516] (W. Va. 1996).

[208] Hughes v. Department of Higher Educ., 934 P.2d 891 [117 Educ. L. Rep. 349] (Colo. Ct. App. 1997).

[209] Gilmore v. Board of Trustees of the Univ. of D.C., 695 A.2d 1164 [119 Educ. L. Rep. 540] (D.C. 1997).

[210] Ntreh v. University of Tex. at Dallas, 936 S.W.2d 649 [115 Educ. L. Rep. 541] (Tex. Ct. App. 1996).

[211] Carter v. Cornell Univ., 173 F.R.D. 92 [119 Educ. L. Rep. 505] (S.D.N.Y. 1997).

In Tennessee, a university sued its former football coach for liquidated damages after he allegedly breached his employment contract. A federal district court denied the coach's motion for summary judgment insofar as it ascertained that the liquidated damages clause was enforceable.[213] The court held that the liquidated damages provision, which required the coach, upon a breach, to pay to the university an amount equal to his base salary multiplied by the number of years remaining on the agreement, was acceptable in light of the potential actual damages that it might incur.

A medical resident challenged a grant in favor of a university hospital when he sued it for allegedly breaching his employment contract. An appellate court in Georgia affirmed that the resident failed to establish a definite, enforceable salary term for the purported contract.[214]

In New York, an appellate court affirmed a grant of summary judgment in favor of a university that was sued by its athletic director.[215] The court noted that since the athletic director was an at-will employee, he could not sustain a breach of contract claim over his dismissal.

Where a medical librarian sued her university for breach of contract, wrongful discharge, and defamation, the parties reached a settlement through arbitration. Subsequently, the university unsuccessfully moved to have a trial court confirm the settlement and dismiss this action. On further review, an appellate court in North Carolina reversed in favor of the university.[216] The court declared that since the librarian accepted and signed the settlement check, she could not bring other claims due to her dismissal.

A football coach whose contract was not renewed claimed that his contract was breached and intentionally interfered with by students. The coach unsuccessfully argued that the institution's personnel manual, which discussed termination for cause procedures and approaches to conflict resolution, converted his one-year contract into a permanent agreement.

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[212] 117 S. Ct. 900 [115 Educ. L. Rep. 623] (1997).

[213] Vanderbilt v. DiNardo, 974 F. Supp. 638 [121 Educ. L. Rep. 175] (M.D. Tenn. 1997).

[214] Laverson v. Macon Bibb County Hosp. Auth., 487 S.E.2d 621 [119 Educ. L. Rep. 1220] (Ga. Ct. App. 1997).

[215] Tramontozzi v. St. Francis College, 649 N.Y.S.2d 43 [114 Educ. L. Rep. 252] (N.Y. App. Div. 1996).

[216] Futrelle v. Duke Univ., 488 S.E.2d 635 [120 Educ. L. Rep. 333] (N.C. Ct. App. 1997).

An appellate court in Pennsylvania affirmed that the coach's consecutive one-year contracts did not convert into a permanent agreement and that the concerns the students conveyed to college officials were not intentional interference with his employment contract.[217]

Defamation was at issue in three disputes. A university employee filed charges of defamation and interference with prospective economic advantage charges against her supervisor over allegedly negative comments he made about her to a prospective employer. After an appellate court reinstated the employee's claims, the university sought further review. The Supreme Court of Illinois reversed in favor of the university.[218] The court maintained that the woman's statement describing herself as the leading candidate for the new position did not support a claim of interference with prospective economic advantage. The court added that the supervisor's statements about the employee's failure to follow up were not defamatory per se nor could it be proven that the remarks were interpreted as defamatory.

When a prominent college basketball coach sued the NCAA claiming the NCAA attempted to force him out of coaching, a trial court denied the NCAA's motion for a change of venue. On further review, the Supreme Court of Nevada affirmed.[219] The court responded that the NCAA failed to show that the jury pool was likely to have read inflammatory articles against it since most of the comments were published several years before the trial date.

A dean challenged the denial of his motion for summary judgment when he was sued for defamation by the former associate dean. An appellate court in Minnesota reversed in favor of the dean.[220] The court observed that absolute immunity applied to the dean's written reprimand and performance evaluations.

Constitutional questions were before the court over comments made by institutions and employees in connection with dismissals. A faculty member who criticized institutional policies and management claimed retaliation in violation of section 1983 and her First Amendment speech and association rights when she was dismissed. The federal district court in Wyoming denied the college's motion for summary judgment on the First Amendment claims but awarded judgment for the president and college in accordance with a jury verdict. On appeal, the Tenth Circuit vacated and remanded on the ground that the First Amendment protected the teacher's pronouncements about nonincumbent candidates for the board of trustees since this was a matter of public concern.[221] However, the court also offered that the instructor's comments in a private conservation on ways to increase adult and minority enrollments were unprotected since they were not matters of public concern. Finally, the panel was of the opinion that since the judge erred in instructing the jury on the *Pickering*[222] test, a new trial was warranted.

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[217] Small v. Juniata College, 683 A.2d 350 [112 Educ. L. Rep. 1006] (Pa. Super. Ct. 1996).

[218] Anderson v. Vanden Dorpel, 667 N.E.2d 1296 [112 Educ. L. Rep. 355] (Ill. 1996).

[219] National Collegiate Athletic Ass'n v. Tarkanian, 939 P.2d 1049 [119 Educ. L. Rep. 690] (Nev. 1997).

[220] Freno v. State, 567 N.W.2d 739 [120 Educ. L. Rep. 797] (Minn. Ct. App. 1997).

A former basketball coach in California appealed the dismissal of his section 1983 suit which claimed that his rights were violated and that he was deprived of a liberty interest when university officials commented that he was dismissed for "profane and abusive behavior toward student athletes." The Ninth Circuit reversed and remanded.[223] The court pointed out that the coach had established that university officials made defamatory statements about him during the course of his dismissal. The panel added that the trial court improperly played fact finder by comparing the coach's and university's characterizations of his behavior toward players and determined that the coach's statements were false.

Damages

A former senior university research associate charged that the scientist who hired her defrauded her of research by misrepresenting prospects of obtaining grants for continued projects. Moreover, the associate filed claims under the state Whistleblower's Protection Act against officials who were appointed to investigate her charges. After a jury entered a verdict in favor of the associate on her fraud and retaliation claims, the university sought further review. An appellate court in Michigan affirmed that the jury could find fraud based on the scientist's misrepresentations and damages could be awarded based on the fraud verdict.[224] The court added that since the retaliation claim was a question for the jury, its damage award was not excessive.

Denial of Employee Benefits

Employees at a university sought further review after the state division of pensions denied health insurance coverage to their same sex domestic partners. An appellate court in New Jersey affirmed that the denial of benefits did not violate the state's Law Against Discrimination, the Equal Protection Clause, or an Executive Order from the Governor.[225] Conversely, the Supreme Court of Alaska affirmed that such a denial violated state laws prohibiting discrimination based on marital status.[226]

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[221] Gardetto v. Mason, 100 F.3d 803 [114 Educ. L. Rep. 66] (10th Cir. 1996).

[222] *Pickering* v. Board of Educ., 391 U.S. 563 (1968).

[223] Campanelli v. Bockrath, 100 F.3d 1476 [114 Educ. L. Rep. 385] (9th Cir. 1996).

[224] Phinney v. Perlmutter, 564 N.W.2d 532 [118 Educ. L. Rep. 1156] (Mich. Ct. App. 1997).

Retirement

State officials appealed an order enjoining the enforcement of an amendment to the state pension plan which suspended benefits for retirees who are reemployed by the state. The Supreme Court of Rhode Island reversed on the ground that the retired faculty members had no contractual right to re-employment and that the retroactive application of the amendment did not violate any existing contractual rights that might have been created by the previous legislation.[227]

Faculty members sought further review of the denial of their request for permanent and mandatory injunctive relief over the meaning of "calendar year" under a retirement incentive plan. The state retirement system interpreted a year as covering January 1 to December 31 while a trial court read it as July 1 to June 30, the same dates used by the university's plan. An appellate court in Ohio affirmed that a calendar year could be interpreted as a period of twelve consecutive months.[228]

In Colorado, a class of former university employees who were participating in an early retirement program challenged the reduction of their retirement benefits.[229] More specifically, they contested the retirement board's failure to count salary increase incentives during their final years on the job in calculating benefits. An appellate court stated that the retirement board properly decided that salary increases granted as incentives for early retirement could not be used to calculate retirement benefits.[230] However, the court added that the board should have conducted individual hearings to calculate which portions of the salary increases should have been counted as early retirement incentives.

Employees of a university laboratory disputed an adverse grant of summary judgment in their class action suit on contract clause and equal protection grounds when the state withdrew an early retirement package and replaced it with a less attractive offer. An appellate court in California affirmed that the first offer did not create a binding contract. In addition, the court posited that since the laboratory employees were not similarly situated to other workers, their equal protection claim was without merit.

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[225] Rutgers Council of AAUP Chapters v. Rutgers, the State Univ., 689 A.2d 828 [116 Educ. L. Rep. 731] (N.J. Super. Ct. App. Div. 1997).

[226] University of Alaska v. Tumeo, 933 P.2d 1147 [117 Educ. L. Rep. 314] (Alaska 1997).

[227] Retired Adjunct Professors of R.I. v. Almond, 690 A.2d 1342 [117 Educ. L. Rep. 205] (R.I. 1997).

[228] Muczyk v. Cleveland State Univ., 675 N.E.2d 1283 [115 Educ. L. Rep. 1034] (Ohio Ct. App. 1996).

[229] Ager v. Public Employees' Retirement Ass'n Bd., 923 P.2d 133 [112 Educ. L. Rep. 1057] (Colo. Ct. App. 1995).

[230] Creighton v. Regents of Univ. of Cal., 68 Cal.Rptr.2d 125 [121 Educ. L. Rep. 273] (Cal. Ct. App. 1997).

The next five cases concern disputes dealing with the number of years of service accrued for retirement. The first case involved an appeal by a faculty member whose grievance was denied in a dispute over how much credit he should have received. The Supreme Court of Alaska affirmed that the grievance council did not abuse its discretion in denying the professor's request for a hearing as untimely.[231]

In the first of four cases from Pennsylvania, the state's High Court upheld the retirement board's denial of a faculty member's request to purchase of out-of-state employment service credits.[232] The court was of the view that the faculty member failed to show that he had an employment relationship with the United States government when he taught in Egypt as a Fulbright Scholar. The same court also wrote that a doctor at a state university medical center was not a public employee who was eligible to purchase service credits for the time she was participating in her residency.[233] Similarly, an intermediate appellate court asserted that a psychiatric medical resident at a state university's medical center was not entitled to service credits for this period of time.[234] Conversely, another appellate court permitted a professor to purchase service credits for the time he was employed by the National Science Foundation.[235]

Disability Benefits

A tenured faculty member who chose early retirement after she was injured in a fall and was unable to work appealed the dismissal of her suit against the board of regents when she lost the opportunity to take long-term benefits because she was not informed that this was an option. The Supreme Court of Iowa reversed in favor of the faculty members on the ground that she was not required to exhaust administrative remedies before bringing a breach of contract claim.[236]

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[231] Matthews v. University of Alaska, 925 P.2d 1052 [114 Educ. L. Rep. 315] (Alaska 1996).

[232] Shafer v. State Employees' Retirement Bd., 696 A.2d 1186 [119 Educ. L. Rep. 1097] (Pa. 1997).

[233] Simmonds v. State Employees' Retirement Sys., 696 A.2d 801 [119 Educ. L. Rep. 1051] (Pa. 1997).

[234] Davis v. State Employees' Retirement Bd., 700 A.2d 1359 [121 Educ. L. Rep. 786] (Pa. Commw. Ct. 1997).

[235] Seliga v. State Employees' Retirement Sys., 682 A.2d 77 [112 Educ. L. Rep. 981] (Pa. Commw. Ct. 1997).

[236] Hornby v. State, 559 N.W.2d 23 [116 Educ. L. Rep. 371] (Iowa 1997).

Life and Health Insurance Coverage

A university employee challenged the denial of his request for family health insurance coverage because his wife, who also worked for the state, had the same family health insurance package. An appellate court in Wisconsin agreed that the denial of family coverage was not marital status discrimination under the state's Fair Employment Act.[237]

Unemployment Compensation

A university appealed an order granting unemployment benefits to a lecturer for part of the summer break between academic years. The Supreme Court of Rhode Island reversed in favor of the university.[238] The court found that the lecturer, whose full-time position was downsized to three-quarter time, was not entitled to unemployment benefits because she would be returning to work in some capacity.

In the first of two cases from Pennsylvania, an appellate court reversed in favor of a former vice president of a state university who was denied unemployment benefits.[239] The court believed that the vice president was entitled to benefits since she was a state employee within the meaning of the law. In the second action, an appellate court indicated that a full-time employee of a state university, who also had a full-time job with a private company, was ineligible for unemployment compensation when he lost his second position but continued to work at the university.[240]

An instructor at a community college who refused to sign his annual contract because he had received threats from a student disputed the denial of his request for unemployment benefits. An appellate court in Florida asserted that since the instructor's fears were valid and the work the college offered him was unsuitable, he was eligible for unemployment compensation.[241]

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[237] Kozich v. Employee Trust Funds Bd., 553 N.W.2d 830 [113 Educ. L. Rep. 437] (Wis. Ct. App. 1996).

[238] University of R.I. v. Department of Employment and Training, 691 A.2d 552 [117 Educ. L. Rep. 215] (R.I. 1997).

[239] Pearson v. Unemployment Compensation Bd. of Review, 689 A.2d 352 [116 Educ. L. Rep. 693] (Pa. Commw. Ct. 1997).

[240] Bloomsburg Univ. of Pa. of the State Sys. of Higher Educ. v. Unemployment Compensation Bd. of Review, 692 A.2d 586 [117 Educ. L. Rep. 1077] (Pa. Commw. Ct. 1997).

[241] Nolan v. Unemployment Appeals Comm'n, 680 So. 2d 595 [113 Educ. L. Rep. 1001] (Fla. Dist. Ct. App. 1996).

Sexual Harassment

Cases alleging sexual harassment continued at a brisk pace. Plaintiffs filed allegations under title VII along with title IX quid pro quo and hostile work environment claims. Suits also addressed institutional liability for such torts as intentional infliction of emotional distress, defamation, and loss of consortium.

Title VII Quid Pro Quo Claims

Quid pro quo sexual harassment involves coercing a person into performing an unwelcome sexual act as part of a bargain to obtain favors or to avoid punitive actions. A tenured professor in Illinois appealed a grant of summary judgment in favor of the university and its provost in her title VII quid pro quo sexual harassment claim that she lost tangible employment benefits because she rejected the provost's advances. The Seventh Circuit reversed since there were material issues of fact in need of resolution over the professor's loss of tangible economic benefits claim resulting from her loss of title and banishment from committee work.[242] The court also ruled that summary judgment was precluded where material issues of fact around the provost's repeated requests for sexual favors and the professor's loss of tangible employment benefits supported her title VII quid pro quo sexual claim. However, the court affirmed that since the provost was being sued in his official capacity, the university was the proper defendant.

A dental student in Missouri filed quid pro quo and hostile environment claims under title IX, alleging that one of her professors made unwanted sexual advances toward her while she worked in his private practice. The student also charged that the professor showed an instructional videotape containing sexual innuendoes. A federal district court granted the university's motion for summary judgment on the quid pro quo claim, but entered judgment for the student on the hostile environment charge. On further review, the Eighth Circuit reversed in favor of the university in holding that it could not be liable since the clinical instructor's private practice was not an educational program or activity within the meaning of title IX.[243] At the same time, the court affirmed that because a single allegation of an offensive videotape did not create a hostile environment, the student failed to establish evidence of a quid pro quo violation.

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[242] Bryson v. Chicago State Univ., 96 F.3d 912 [112 Educ. L. Rep. 668] (7th Cir. 1996).

[243] Lam v. Curators of the Univ. of Miss. at Kansas City Dental Sch., 122 F.3d 654 [120 Educ. L. Rep. 948] (8th Cir. 1997).

Hostile Environment Claims

A hostile work environment exists when an employee of one gender experiences a work environment "permeated with discriminatory intimidation, ridicule, and insult which is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[244] The courts require plaintiffs to establish five elements in order to prove the existence of a hostile work environment. First, a plaintiff must be a member of a protected group. Second, a person must show that the conduct is unwelcome. Third, a party must demonstrate that the harassment was based on gender. Fourth, the harassment must be sufficiently severe and pervasive enough to create an abusive work environment. Finally, a plaintiff needs to prove that an employer knew or should have known about the harassment and either failed to remedy the situation or condoned it outright.

Where a female employee in New York unsuccessfully sued her university and various officials over sexual and racial harassment along with retaliation, she appealed. The Second Circuit affirmed a grant of summary judgment in favor of the defendants.[245] The court noted that while the female employee established that the conduct of her male supervisor created a prima facie case of a hostile work environment, the facilities manager at the dental center where she worked was neither sufficiently high enough in the hierarchy to impute liability to the university nor had she demonstrated that the manager condoned or encouraged the harassing behavior.

In Missouri, a medical resident appealed a grant of summary judgment in favor of her university when she alleged that she was retaliated against after complaining about sexual harassment. The Eighth Circuit reversed in observing that there were material issues of fact as to whether the harassment by the department chair was sufficiently severe and pervasive and whether the university knew or should have known about it but failed to remedy the situation.[246]

Co-worker Harassment Claims

An employee challenged the dismissal of her sexual harassment and slander claims against her university and her co-workers wherein she alleged that rumors spread by secretaries and others about her created a hostile environment that resulted in her seeking a transfer. An appellate court in Texas affirmed that the employee's title VII claim was time barred since it was not a continuous violation.[247] The court added that the woman neither established a prima facie case of sexual harassment nor proved that the university's legitimate proffered reason for her transfer was a pretext for discrimination.

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[244] Harris v. Forklift Sys., 510 U.S. 17, 20 (1993).

[245] Torres v. Pisano, 116 F.3d 625 [119 Educ. L. Rep. 61] (2d Cir. 1997).

[246] Smith v. St. Louis Univ., 109 F.3d 1261 [117 Educ. L. Rep. 82] (8th Cir. 1997).

Student Harassment Claims

Two female students in New York sought further review of an adverse grant of summary judgment in the sexual harassment complaint against a male professor who, after giving them low grades, invited them to his office, made sexually explicit comments, and eventually changed their grades without reviewing their examinations. The Second Circuit vacated in favor of the students since there were material issues of fact as to whether the college had notice of the hostile environment created by the professor and whether it took an appropriate response to the situation.[248]

A student filed suit under title IX, section 1983, and state law claiming that a professor sexually harassed her. A federal district court in Indiana granted the university's motion for summary judgment in deciding that the state's two-year statute of limitations, which applied to the claim, was not tolled on the basis of fraudulent concealment or equitable tolling.[249]

In a case from Michigan, male students claimed that a female faculty member created a hostile classroom environment for men. Subsequently, the faculty member unsuccessfully sued the former students and college for assault and battery, tortious interference with contract, gross negligence, defamation, and violations of her rights to free speech, privacy, and liberty. A federal district court granted the university's motion for summary judgment and remanded the state law claims against the students to a state court.[250] The court declared that the college did not act with gross negligence, that its production of documents pursuant to a subpoena in the faculty member's defamation claim was protected by a qualified privilege, and that her First Amendment rights were not violated when she was asked not to discuss the controversy with students in her classes.

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[247] Jackson v. Texas A & M Univ. Sys., 975 F. Supp. 943 [121 Educ. L. Rep. 627] (S.D. Tex. 1996).

[248] Kracunas v. Iona College, 119 F.3d 80 [120 Educ. L. Rep. 84] (2d Cir. 1997).

[249] Monger v. Purdue Univ., 953 F. Supp. 260 [116 Educ. L. Rep. 607] (S.D. Ind. 1997).

[250] Bowers v. Reutter, 951 F. Supp. 666 [116 Educ. L. Rep. 141] (E.D. Mich. 1997).

Constitutional Protections

After students complained that a professor's sexual comments, inquiries, and jokes in class created a hostile environment, the university launched a sexual harassment investigation. The professor alleged that the university's investigation violated his rights to substantive and procedural due process, free speech, and academic freedom . A federal district court in Illinois granted the university's motion for summary judgment on the basis that the substantive due process claim could not emanate from First Amendment or academic freedom violations.[251] Further, the court was of the opinion that the faculty member did not have a state law claim of substantive due process.

In Pennsylvania, a doctoral student brought title VII and IX claims of sexual harassment and state law charges including loss of consortium against the chair of her doctoral committee and the university. After the committee discovered that the student manipulated data on her dissertation, some members wanted to take severe action. However, the committee permitted the student to complete her dissertation. A federal district court granted the defendants' motion for summary judgment as to the student's claims of intentional infliction of emotional distress for sexual harassment in the workplace under state law.[252] The court added that allegations arising out of the plaintiff's role as a student, rather than an employee, did not support her title VII claim and that her dismissal from a research project when its funds expired was not a pretext for title VII retaliation for failure to succumb to the professor's alleged advances. In concluding that the student's section 1983 sexual harassment claim was subsumed by her title IX allegation, the court denied a motion for summary judgment because she might prevail under agency principles under title IX.

Liability

Personal Injury

Death or Injury

Where a peace officer died from a heart attack that was allegedly caused by physical exertion from a training course that was co-sponsored by the university's board of regents and others, his estate challenged a finding that the co-sponsors were not liable. An appellate court in Georgia affirmed that the jury had been properly charged that the general duty of ordinary care applies to schools and universities.[253]

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[251] Rubin v. Ikenberry, 933 F. Supp. 1425 [112 Educ. L. Rep. 190] (C.D. Ill. 1996).

[252] Stilley v. University of Pittsburgh of the Commw. Sys. of Higher Educ., 968 F. Supp. 252 [119 Educ. L. Rep. 860] (W.D. Pa. 1996).

Hazing

After a college student in Missouri died when he consumed excessive amounts of alcohol during his initiation into a campus organization, his parents brought a wrongful death action against members of the organization. A trial court dismissed the action because the parents failed to state a claim upon which relief could be granted. On further review, and appellate court reversed and remanded in favor of the parents.[254] The court determined that the parents established a cause of action because they sufficiently alleged that the defendants' conduct was the proximate cause of their son's death since they pressured him to drink and then abandoned him, and, that absent their conduct, the student would not have consumed the fatal quantity of alcohol.

Alcohol

An underage member who consumed alcohol at a fraternity party was subsequently involved in a car accident. The other driver survived for almost two years before dying of his injuries. Subsequently, the fraternity pledges appealed a ruling that they could be liable in the wrongful death action. The Supreme Court of Arizona reversed in favor of the pledges.[255] The court pointed out that the pledges were not liable because they were not involved in a joint venture insofar as they had no control over the fraternity's actions in purchasing alcohol for the party and serving it to minors.

Strict Liability

A university appealed its liability for injuries sustained by a student who was hurt when he tripped and fell due to a depression on a campus sidewalk in a high pedestrian traffic area.[256] The Supreme Court of Louisiana reversed in positing that the university was not strictly liable for the student's injuries because the small depression in the sidewalk was not an unreasonable danger. Further, the court wrote that it is beyond reasonable expectation for the university to police more than twenty-two miles of sidewalk and to keep them in perfect repair since state entities are not liable for every irregularity in a street or sidewalk.

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[253] Royals v. Georgia Peace Officer Standards & Training Council, 474 S.E.2d 220 [112 Educ. L. Rep. 482] (Ga. Ct. App. 1996).

[254] Nisbet v. Bucher, 949 S.W.2d 111 [120 Educ. L. Rep. 340] (Mo. Ct. App. 1997).

[255] Estate of Hernandez by Hernandez-Wheeler v. Flavio, 930 P.2d 1309 [115 Educ. L. Rep. 1067] (Ariz. 1997).

[256] Boyle v. Board of Supervisors, La. State Univ., 685 So. 2d 1080 [115 Educ. L. Rep. 587] (La. 1997).

Similarly, another appellate court in Louisiana reversed in favor of a university that was sued by a student who was injured when she fell on a campus sidewalk.[257] The court stated that the university was not liable since the area where the student fell did not present an unreasonable risk of harm because the severity of her injuries notwithstanding, the condition near the sidewalk was obvious and the place where she fell was not designed for pedestrian use.

Scope of Duty

The parents of a college student who was murdered by his professor brought a wrongful death suit against the university. After the court granted summary judgment in favor of the university, the parents appealed claiming that the university was liable under respondent superior because the faculty member was acting within the line and scope of his employment when the young man was killed. The parents also argued that the university was negligent in both hiring and supervising the professor. The Supreme Court of Alabama affirmed that the university was not liable since the murder was a radical deviation from the scope of the professor's employment.[258] The court also asserted that since it was not foreseeable that he would or might commit the murder while at work, the university was not negligent in hiring or supervising the professor.

The administrator of the estate of a spectator who was fatally shot by a gang member as she left a fireworks show in a university stadium appealed a grant of summary judgment in favor of the university. The Supreme Court of Kansas affirmed that the university and its athletic association were not liable as they employed reasonable security measures where the shooting was not foreseeable.[259] The court decided that since there had been no other shootings at the event and the university had no information that gang members would be present, there was no reason to impute liability to it even though the crime rate in the surrounding neighborhood was high.

When her son died shortly after being delivered via a cesarean section, a mother filed a negligence and wrongful death action on behalf of

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[256] Maxwell v. Board of Trustees, 692 So. 2d 641 [117 Educ. L. Rep. 1153] (La. Ct. App. 1997).

[257] Copeland v. Samford Univ., 686 So. 2d 190 [115 Educ. L. Rep. 1088] (Ala. 1996).

[258] Gragg v. Wichita State Univ., 934 P.2d 121 [117 Educ. L. Rep. 325] (Kan. 1997).

herself and husband against the hospital and various staff members. The mother also filed a separate complaint against the medical college and resident who assisted in her treatment. Shortly thereafter, the physician named in the original action sued the college and resident for indemnification and contribution. After the mother settled the first two suits, an appellate court in Ohio affirmed the college's motion for summary judgment against the physician.[260] The court reflected that because the physician was a joint tortfeasor with the resident and medical college, he was not entitled to indemnification. The court added that since the original claims had been settled in good faith, the medical college had no further liability.

Bodily Injury

On Campus

In the first of two cases from New York, a spectator who was stabbed at a rap concert on the campus of a public university unsuccessfully sued the state to recover for his injuries.[261] An appellate court affirmed that since all spectators were required to undergo security measures, the state was acting in a governmental capacity which meant that the spectator would have had to show that the state owed him a special duty of protection. The court reasoned that the spectator's claim was without merit insofar as he did not present evidence to establish that the state owed him a special duty.

A student who was shot during a hostage situation on the campus of a public university campus sued the state claiming that it negligently failed to provide adequate security or to protect him and others from foreseeable risks. The student also filed a motion for discovery regarding prior attacks on campus and related information. A trial court limited the student's request for discovery to "unauthorized weapons and hostage situations on campus" since the other requests were overly broad and lacked specificity. On further review, an appellate court expanded the scope of the student's allowable discovery to include the additional elements of "prior attacks and assaults." [262] However, the court refused to grant the student access to all of the information he wanted in deeming that his requests for data on "security breaches" and "unauthorized persons on campus" were impermissibly vague.

In Texas, a visitor challenged a directed verdict in favor of a university, its regents, and the state when she sued to recover for injuries that she sustained due to a fall on the sidewalk. An appellate court affirmed that although the visitor told a cafeteria employee about her fall and asked her to report it to the proper authorities, this did not provide the university with actual notice of her claim.[263] The court said the university would only have received actual notice of the incident if the accident was related to a person who had a duty to investigate the matter.

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[260] Whitney v. Horrigan, 679 N.E.2d 315 [118 Educ. L. Rep. 741] (Ohio Ct. App. 1996).

[261] Rashed v. State, 648 N.Y.S.2d 131 [113 Educ. L. Rep. 882] (N.Y. App. Div. 1996).

[262] McEnaney v. State, 662 N.Y.S.2d 615 [121 Educ. L. Rep. 294] (N.Y. App. Div. 1997).

As a student crossed a publicly-owned street on campus to get to class, she was hit by a car. She sued the college for negligently failing to install pedestrian crosswalks in the area of the accident. A trial court in New York granted the college's motion for summary judgment.[264] The court mandated that the college did not owe the student a duty while she was crossing a public street, even though it was located on campus, since it neither controlled nor had authority over the road. The court added that there was not a special relationship between the college and the student that might have given rise to such a duty.

Similarly, where a minor was hit by a car and injured while crossing the street at a crosswalk on campus, he and his father unsuccessfully sued the university. An appellate court in Michigan affirmed that since the university had governmental immunity, the highway exception did not apply because the state's duty to maintain and be liable for highways did not include crosswalks.[265] Further, the court was of the opinion that the stop sign posted at the intersection was not a nuisance per se since it served a beneficial public purpose by alerting motorists to stop for pedestrians.

Residence Halls or Living Units

A fraternity member who fell out of a second floor window in his fraternity house unsuccessfully sued his university, his local chapter, the national organization, and the owner of the house for his injuries. An appellate court in New York affirmed a grant of summary judgment in favor of the university and the local chapter, a partial grant on behalf of the owner, and a dismissal in favor of the national fraternity.[266] The court contended that since the university did not have a duty to supervise and control the student's conduct, it could not have breached a nonexistent duty.

In a second case from New York, a student who was struck by a traffic cone thrown by a fellow student as she stood in line at a campus cafeteria sued the community college and others for failure to provide proper security. After a trial court granted the defendants' motion for summary judgment, an appellate tribunal affirmed.[267] The court agreed that none of the defendants had a duty to protect the student and that the extraordinary act of the individual who threw the cone were not foreseeable.

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[263] McDonald v. State, 936 S.W.2d 734 [115 Educ. L. Rep. 547] (Tex. Ct. App. 1997).

[264] Obiechina v. Colleges of the Seneca, 652 N.Y.S.2d 702 [115 Educ. L. Rep. 443] (N.Y. Sup. Ct. 1996).

[265] Palmer v. Western Mich. Univ., 568 N.W.2d 359 [120 Educ. L. Rep. 1150] (Mich. Ct. App. 1997).

[266] Rothbard v. Colgate Univ., 652 N.Y.S.2d 146 [115 Educ. L. Rep. 60] (N.Y. App. Div. 1997).

Off-Campus, Institution-Sponsored or Sanctioned Event

A coach who was injured in a car accident after returning a potential high school recruit to his home town sought further review of a grant of summary judgment in favor of the university and a car rental agency. An appellate court in Louisiana reversed in favor of the coach as to the car agency since there was a material question of fact as to which contract governed its relationship with the university.[268] However, the court affirmed that the university was properly granted summary judgment since the coach's sole remedy against it was workers' compensation where the risk which caused the accident unquestionably arose out of her employment duties.

Sports Activity

In Florida, a student intern challenged a ruling in favor of the baseball team he was working for when he sued it for negligence after he injured his ear when it struck an antenna which was protruding from a radio mounted on a wall. On further review, an appellate court affirmed that the team was immune from liability since the student was an employee.[269] The court added that the student's sole remedy was under the Worker's Compensation Act.

A university gymnast from Michigan unsuccessfully attempted to recover for injuries that he sustained while on a road trip with the team. The student injured his face and head when the coach led the team on a sledding outing and he crashed into a tree at the bottom of a slope. An appellate court affirmed a grant of summary judgment in favor of the defendants.[270] The court indicated that since the operation of intercollegiate athletic programs is a governmental function, the university and its officials were entitled to immunity.

Where a member of a rugby club broke his neck during practice, an appellate court in New York affirmed that the state university was not liable for negligent supervision. The court ascertained that as an experienced rugby player who had previously suffered from injuries in a sport where the risk of harm was apparent, the student assumed the obvious risk of injury.[271]

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[267] Ruchalski v. Schenectady County Community College, 656 N.Y.S.2d 784 [118 Educ. L. Rep. 427] (N.Y. App. Div. 1997).

[268] Bolton v. Tulane Univ. of La., 692 So. 2d 1113 [117 Educ. L. Rep. 1161] (La. Ct. App. 1997).

[269] Hallal v. RDV Sports, 682 So. 2d 1235 [114 Educ. L. Rep. 718] (Fla. Dist. Ct. App. 1996).

[270] Harris v. University of Mich. Bd. of Regents, 558 N.W.2d 225 [115 Educ. L. Rep. 488] (Mich. Ct. App. 1996).

In Massachusetts, a university and two coaches challenged a jury verdict in favor of a pole vaulter who was seriously injured when he fell off the back edge of a landing pit and hit his head. An appellate court affirmed in favor of the injured athlete.[272] The court agreed that the evidence supported the conclusion that the accident was reasonably foreseeable since both of the coaches knew that vaulters had been injured by second impact injuries of bouncing off the pit mattress and landing outside of the pit. The court added that the defendants were at fault because although supplemental padding was available, it was not used at the time of the accident.

In Class

The state board of community college appealed a ruling in favor of a student in a graphics arts class who injured her thumb while cleaning a printing press. On remand from the Supreme Court of Colorado's reversal in favor of the board, an appellate tribunal affirmed the dismissal of the student's claim on the ground that the board was entitled to statutory immunity.[273] The court observed that the student failed to establish that the board waived its immunity because she had not proved that her injuries were caused by a physical or structural defect in the building.

Scope of Duty

A former college basketball player who suffered knee injuries sued the college, his coach, and the athletic trainer. The player alleged that the coach was negligent in allowing him to play despite his knee injuries and that the trainer was at fault for permitting him to participate despite medical evidence to the contrary. After a trial court granted the defendants' motion for summary judgment, the player appealed. The Supreme Judicial Court of Maine reversed on the basis that the coach and trainer owed the player a duty of reasonable care.[274] The court held that the player did not have to present expert testimony to establish the standard of care applicable to the trainer over the claim that he failed to advise the coach properly as to the extent of his injury.

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[271] Regan v. State, 654 N.Y.S.2d 488 [116 Educ. L. Rep. 768] (N.Y. App. Div. 1997).

[272] Moose v. Massachusetts Inst. of Technology, 683 N.E.2d 706 [120 Educ. L. Rep. 562] (Mass. App. Ct. 1997).

[273] Reynolds v. State Bd. for Community Colleges & Occupational Educ., 937 P.2d 774 [118 Educ. L. Rep. 780] (Colo. Ct. App. 1996).

[274] Searles v. Trustees of St. Joseph's College, 695 A.2d 1206 [119 Educ. L. Rep. 545] (Me. 1997).

In Mississippi, a motorcyclist who was hit by a van sued its driver and the driver's employer, a public junior college in Alabama, to recover for his injuries. A trial court in Mississippi applied Alabama law in dismissing the school from the suit based on sovereign immunity. The court also entered a jury verdict in favor of the van driver. On further review, the Supreme Court of Mississippi reversed and remanded in declaring that Mississippi, rather than Alabama, law should have applied in evaluating whether the college had sovereign immunity.[275] The court added that under Mississippi law, the college did not enjoy sovereign immunity.

In Utah, a football player who experienced pain in his back over a period of years after he was hurt during practice sued the university to recover based on the university's alleged negligence in responding to his injuries. The federal district court partially granted the university's motion for summary judgment in finding that since it did not have a special relationship with the player, it did not owe him any additional duties.[276] However, the court denied a similar motion because there were material issues of fact as to whether the university breached its duty of care in diagnosing and treating the player's injuries.

Defamation

A doctoral student in nutritional sciences who was using the resources of a university in Alabama to write her dissertation sued it and various officials alleging that they made false statements to the National Institutes of Health (NIH) in connection with a grant that they received. After the Office of the Inspector General of the Department of Health and Human Services investigated the matter and recommended that no action should be taken, a federal trial court in Maryland ruled in favor of the student. On further review, the Fourth Circuit reversed in maintaining that the student failed to produce sufficient evidence to establish the falsity of the university's statements to the NIH.[277]

In New York, a professor and his wife who were accused of plagiarism unsuccessfully sued his college, its president, provost, and several faculty members for intentional infliction of emotional distress. On further review, an appellate court affirmed that the plaintiffs failed to state a cause of action for intentional infliction of emotional distress.[278]

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[275] Church v. Massey, 697 So. 2d 407 [120 Educ. L. Rep. 604] (Miss. 1997).

[276] Orr v. Brigham Young Univ., 960 F. Supp. 1522 [118 Educ. L. Rep. 267] (D. Utah 1994).

[277] United States v. Board of Trustees of the Univ. of Ala., 104 F.3d 1453 [115 Educ. L. Rep. 344] (4th Cir. 1997).

After a newspaper in California published five reports alleging that a university's medical program was improperly managed, a doctor who worked there sued it and a reporter for defamation. A trial court granted the defendants' motion to strike the claims and an appellate tribunal affirmed.[279] The court acknowledged that the defendants were not liable since they acted within their free speech rights because the articles were both in connection with a public issue and public official proceeding.

In Indiana, female student sued a male who sent a letter to the presidents of fraternities on campus recommending that their members be tested for sexually transmitted diseases if they had sexual contact with her or another woman he named in the letter. A trial court entered a jury verdict in favor of the woman and an appellate tribunal affirmed.[280] The court concluded that since the letter was not published in good faith, the defendant could not rely on the defense of qualified privilege. In addition, the panel agreed that the trial court did not err in instructing the jury that the letter was defamatory per se because there was evidence in the letter to support such an instruction.

Breach of Physician/Professional—Patient/Client Relationship

In Texas, a physician in a state medical residency program sued, alleging that officials violated her Fourth Amendment right to be free from unreasonable searches and seizures when she was required to undergo a drug test after she slapped a patient's face twice in an impulsive reaction after having difficulty restraining him. A federal district court decided in favor of the doctor but the Fifth Circuit reversed.[281] According to the court, the drug test did not violate the physician's Fourth Amendment rights because the search was reasonable and the hospital's interests outweighed her privacy concerns.

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[278] Klinge v. Ithaca College, 652 N.Y.S.2d 377 [115 Educ. L. Rep. 415] (N.Y. App. Div. 1997).

[279] Braun v. Chronicle Publishing Co., 61 Cal. Rptr. 2d 58 [115 Educ. L. Rep. 989] (Cal. Ct. App. 1997).

[280] Owens v. Schoenberger, 681 N.E.2d 760 [119 Educ. L. Rep. 644] (Ind. Ct. App. 1997).

[281] Pierce v. Smith, 117 F.3d 866 [119 Educ. L. Rep. 354] (5th Cir. 1997).

Malicious Prosecution

A college student who claimed that she had been raped initially signed a statement asserting that she did not know her attacker. However, when the student signed a later statement indicating that she did know the rapist, college officials filed a complaint against her for falsification. When the student sued for malicious prosecution, false arrest and imprisonment, defamation, invasion of privacy and intentional and/or negligent infliction of emotional distress, the Ohio Court of Claims rendered a judgment in favor of the university.[282] The court was of the opinion that the student was not maliciously prosecuted because the university acted reasonably, without malice, and had probable cause to believe that she was guilty of the crime of falsification. The court added that the student's false arrest and imprisonment claim was without merit and that she failed to prove the remaining three charges.

When a resident assistant and a student were involved in an altercation after the latter refused to comply with a fire drill, his battery suit in state court was moved to a federal venue and dismissed. Subsequently, the student filed an amended complaint in federal court alleging violations of the Fourth Amendment and state law. A federal trial court in Illinois granted the assistant's motion for summary judgment when it decreed that he was not acting under color of state law because it was not related in any meaningful way to his official duties.[283] However, the court remanded the state claims to state court rather than dismiss them outright.

Procedures

A doctoral student on medical leave claimed her faculty advisor and others conspired to steal a survey that she developed and present it as their own work. The student sued them in their official capacities for violating the State Racketeer Influenced and Corrupt Organizations Act (RICO). The Supreme Court of North Dakota affirmed the dismissal but reversed and remanded for a trial of the defendants in their personal, as opposed to official, capacities.[284] The trial court again found for the defendants on the basis that the statute of limitations had run on the student's claim. The Supreme Court, in turn, reversed and remanded since the seven-year statute of limitations under RICO, rather than the three-year period available on the conspiracy charge, applied.

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[282] Buchheit v. Youngstown State Univ., 670 N.E.2d 1379 [113 Educ. L. Rep. 415] (Ohio Ct. Cl. 1996).

[283] Teta v. Packard, 959 F. Supp. 469 [117 Educ. L. Rep. 1055] (N.D. Ill. 1997).

[284] Burr v. Kulas, 564 N.W.2d 631 [118 Educ. L. Rep. 1184] (N.D. 1997).

In California, a motorcyclist who was injured in a collision with a rented vehicle driven by a foreign student trainee filed suit against the airline company that provided the other driver with the scholarship that brought him to the United States. A federal district court entered a judgment in favor of the motorcyclist, but the Ninth Circuit reversed and remanded.[285] In noting that the airline was entitled to sovereign immunity, the court dismissed the claims against it due to lack of federal jurisdiction.

University May be Liable for Old Injuries

During the 1940s, a university in Tennessee, in conjunction with the state department of public health and a private foundation, conducted experiments involving radioactive isotopes in order to track iron absorption in pregnant women. Approximately fifty years later, the subjects of the experiments sued the university alleging that they were unaware of the radioactive nature of the solution that they ingested, they were never informed of the risks of the study, and they were not given the opportunity to refuse to participate in the study. A federal district court denied the defendants' motions to dismiss since material issues of fact remained as to whether they were state actors subject to the longer personal injury statute of limitations than for claims alleging medical malpractice.[286]

Workers' Compensation

Where an employee who aggravated a preexisting condition at work received temporary total disability compensation from the university for about two months, the Workers' Compensation Board appointed an independent medical examiner who confirmed that the employee was entitled to benefits. Even so, the board relied on other medical opinions and terminated the claimant's benefits. On further review, the Supreme Court of Alaska agreed that the board was not required to adopt the opinion of the independent medical examiner and it did not make an error of fact or law in concluding that the claimant was ineligible for benefits because he was medically stable.[287]

A teacher at an adult vocational school who was awarded benefits for disability and injuries caused by the cumulative effect of exposure to various chemicals during the course of his work unsuccessfully sought a fifteen percent safety penalty on the basis that the program violated the state's Occupational Safety and Health Act. After an appellate court granted the claimant's request for the penalty, the Supreme Court of Kentucky reversed.[288] The court pointed out that since the teacher failed to prove that the school intended to violate the statute, it was not subject to the penalty.

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[285] Randolph v. Budget Rent-A-Car, 97 F.3d 319 [113 Educ. L. Rep. 79] (9th Cir. 1996).
[286] Craft v. Vanderbilt Univ., 940 F. Supp. 1185 [113 Educ. L. Rep. 1157] (M.D. Tenn. 1996).
[287] Brown v. State, 931 P.2d 421 [116 Educ. L. Rep. 417] (Alaska 1997).

In Alabama, an employee who developed bilateral carpal tunnel syndrome sought further review of a grant of summary judgment in favor of the university in her suit for workers' compensation benefits. An appellate court reversed and remanded.[289] The court posited that even though the employee's complaint did not assert that she had missed time from work, she had established a claim for which relief could be granted.

A community college challenged the denial of its motion for summary judgment in a suit filed by a female part-time student worker in its physical education department who alleged that she was sexually harassed by a male coach. An appellate court in New York reversed in favor of the college.[290] The court offered that because the conduct in question occurred while the student was performing the duties of her job, her exclusive remedy was under the state's Workers' Compensation Law. The court added that since college officials immediately placed the coach on leave when the student informed them of his conduct, there was no showing that they acquiesced in or condoned his behavior, a necessary element in a case for sexual discrimination.

Contract Liability

Contract Terms

Where a graduate student's assistantship was not renewed largely due to complaints about his unprofessional behavior, he sued the university's board of trustees for denial of due process, defamation, and breach of contract. After a trial court ruled in favor of the student, the board appealed. The Supreme Judicial Court of Appeals of West Virginia affirmed with respect to the breach of contract claim because the university did not raise the issue of the student's behavior on appeal.[291]

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[288] Cabinet for Workforce Dev. v. Cummins, 950 S.W.2d 834 [120 Educ. L. Rep. 1230] (Ky. 1997).

[289] Jackson v. Tuskegee Univ., 684 So. 2d 1330 [115 Educ. L. Rep. 208] (Ala. Civ. App. 1996).

[290] Sormani v. Orange County Community College, 659 N.Y.S.2d 507 [119 Educ. L. Rep.625] (N.Y. App. Div. 1997).

[291] Hupp v. Sasser, 490 S.E.2d 880 [121 Educ. L. Rep. 382] (W. Va. 1997).

However, in reversing the due process claim, the court stated that the student did not have a constitutionally protected property interest in continued employment as a graduate assistant and that even if he did, he received due process with regard to the complaints against him prior to his dismissal. Turning to the defamation charge, the court ascertained that it was without merit since the alleged statements lacked defamatory content.

A private sign maker sued a state university for breach of contract over the construction of scoreboards for a basketball arena and for violating the state's open meeting and competitive bidding laws. The sign maker argued that after the university accepted its bid and it had begun building the scoreboards, university officials contracted with another company. The Supreme Court of Texas affirmed that as part of the state, contract claims against the university were barred by sovereign immunity.[292]

Tourists from Wisconsin who were visiting the Rose Bowl unsuccessfully sued the board of regents for breach of contract because their tickets were unavailable when they arrived at the game. An appellate court affirmed that university could not be sued for breach since it was not a party to the Rose Bowl Agreement.[293]

Five students disputed the dismissal of their suit against their technical college for breach of contract and violation of the Consumer Protection Act (CPA) over a real estate appraisal course. An appellate court affirmed that the students failed to state a claim for which relief could be granted.[294] The court agreed that the students, who had the burden of proving the contract, failed to establish the existence of a binding agreement and that the instructor's representation of the course content did not create a contract between the students and the college. The court added that the college was exempt from the CPA because it was a political subdivision that was not subject to its provisions.

Two students sued their university for breaches of contract and fiduciary duty along with charges that it committed deceptive acts and practices in misrepresenting the preparation needed for, and nature of, a graduate level computer programming class. The university counter claimed for the balance of the tuition due because the students withdrew from the course. A trial court ruled in favor of the students, but an appellate court in New York reversed.[295] The court maintained that the students' breach of contract claim was not an actionable as educational malpractice and that the other two claims were improperly entertained because they were mere reformulations of that same charge. Further, the court declined to explore the educational, pedagogical, and administrative factors regarding the class, saying that these matters were best left to the educational community.

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[292] Federal Sign v. Texas S. Univ., 951 S.W.2d 401 [121 Educ. L. Rep. 394] (Tex. 1997).

[293] Anderson v. Regents of Univ. of Cal., 554 N.W.2d 509 [113 Educ. L. Rep. 904] (Wis. Ct. App. 1996).

[294] Ottgen v. Clover Park Technical College, 928 P.2d 1119 [114 Educ. L. Rep. 1243] (Wash. Ct. App. 1996).

[295] Andre v. Pace Univ., 655 N.Y.S.2d 777 [117 Educ. L. Rep. 273] (N.Y. App. Term 1996).

A contractor that was renovating a building on campus challenged an adverse grant of summary judgment when it sued a university for breach of contract after the latter terminated the agreement because the work was not substantially completed by an agreed-upon date. An appellate court affirmed that the contractor was not entitled to consequential damages because the loss was not foreseeable when the parties entered into the contract.[296] At the same time, the court reversed in declaring that the contractor could not recover damages over a loan due to a lack of connection between the alleged breach and loss. The court also remanded since summary judgment was precluded where there was a material issue of fact regarding which party was at fault for the project's noncompletion.

In Georgia, a university hospital successfully sued an optical company for acceleration of the balance of the rent due, alleging that the firm defaulted on its lease of space at the hospital. An appellate court affirmed that although the optical company complied with the property manager's request that it vacate the premises before the end of the lease term, the firm remained liable for past due rent since this did not constitute an accord and satisfaction of the lease.[297]

Settlement Agreement

In Connecticut, a development partnership obtained an order confirming an arbitration award against a corporation affiliated with a state university that had been charged with overseeing the construction of a research and development park near campus. Subsequently, the corporation challenged a trial court's holding that the award was definite and final. On further review, the Second Circuit affirmed that the corporation's contentions were without merit.[298]

Insurance Contracts

A homeowners' insurer sought a declaratory judgment that it was not required to indemnify or defend a student who set fire to the Astroturf in his university's football stadium. After a federal district court in Illinois decided that the insurer did not have to defend the student, the Seventh Circuit affirmed.[299] The court asserted that setting fire to the field was precluded from coverage under the exclusion for property damage which is expected or intended by the insured.

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[296] MLK v. University of Kan., 940 P.2d 1158 [119 Educ. L. Rep. 1205] (Kan. Ct. App. 1997).

[297] Digby's v. Emory Univ., 489 S.E.2d 81 [120 Educ. L. Rep. 613] (Ga. Ct. App. 1997).

[298] Conntech Dev. Co. v. University of Conn. Educ. Properties, 102 F.3d 677 [114 Educ. L. Rep. 1031] (2d Cir. 1996).

Bidding

Where a university submitted a notice of intent to award a coal hauling and unloading contract to a different company, the original firm sued unsuccessfully. The Supreme Court of Alaska affirmed that there was a reasonable basis for the award to the second company since the plaintiff violated the terms of its sole-source contract and was not the lowest bidder when the university issued a request for proposals.[300]

Unsuccessful bidders for a construction management services contract with a university sued it and its board of regents claiming that the contract did not comply with competitive bidding procedures under state law. The Supreme Court of Oklahoma affirmed in favor of the university.[301] The court found that the contract was not subject to the bidding law since it was for a personal service that called for professional expertise or judgment. The court acknowledged that the key element was that the university planned to use construction management companies, rather than a general contractor, to coordinate and manage capital improvements.

Racketeering

Former students sued a proprietary college under RICO, alleging that the college received money from a pattern of racketeering activity. The students further alleged that they did not receive the education promised and were forced to repay loans for educational services that had not been rendered. A federal trial court in Louisiana granted the college's motion to dismiss.[302] The court decreed that the students failed to plead elements of RICO properly since the alleged fraud was not described with sufficient particularity. However, the court granted the students thirty days to file an amended complaint after which time it would be dismissed with prejudice.

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[299] Nationwide Ins. v. Board of Trustees of the Univ. of Ill., 116 F.3d 1154 [119 Educ. L. Rep. 96] (7th Cir. 1997).

[300] Gunderson v. University of Alaska, Fairbanks, 922 P.2d 229 [112 Educ. L. Rep. 452] (Alaska 1996).

[301] McMaster Constr. v. Board of Regents of Okla. Colleges, 934 P.2d 335 [117 Educ. L. Rep. 343] (Okla. 1997).

[302] Schaeffer v. Ascension College, 964 F. Supp. 1067 [118 Educ. L. Rep. 1034] (M.D. La. 1997).

A former football player alleged that coaches and university officials violated RICO and state law by exploiting talented athletes. More specifically, the player charged that university officials acted with impropriety in keeping athletes eligible for competition and that they improperly provided medical care for his injuries. A federal district court in Texas rejected the player's RICO claims since they were barred by the Eleventh Amendment.[103] The court dismissed the allegation that the university was liable for the player's knee injury because it was not compensable under RICO.

Contract Liability

A contractor appealed after it unsuccessfully sued a university to recover for incurring unanticipated additional costs during construction of a sports facility. The Supreme Court of Rhode Island vacated and remanded.[104] The court reasoned that no contract ever existed between the contractor and the university since, absent an agreement in writing, the parties failed to reach a mutual understanding regarding the scope of work to be done.

In a second case from Rhode Island, a lender sued a college on a guaranty of loan to an asbestos removal contractor. The federal district court entered judgment for the lender, but the Second Circuit reversed on the basis that the college's vice president of business affairs lacked apparent authority to enter into the guaranty with the lender.[105] The court observed that because this guaranty was a novel and rare transaction for the college, the bank did not have a duty to inquire whether the vice president actually possessed the authority to sign the guaranty. The court concluded that since the bank did not inquire about the vice president's apparent authority, it acted unreasonably.

Where the contractor that was charged with erecting a science building at a public university incurred additional costs due to changes, errors, omissions, and requests by state agents to coordinate parts of the project with other companies, it sued for breach of contract. The Court of Claims of Ohio wrote that the contractor was entitled to recover for project changes on all counts.[106]

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[103] Gaines v. Texas Tech Univ., 965 F. Supp. 886 [119 Educ. L. Rep. 140] (N.D. Tex. 1997).

[104] Marshall Contractors v. Brown Univ., 692 A.2d 665 [117 Educ. L. Rep. 1082] (R.I. 1997).

[105] FDIC v. Providence College, 115 F.3d 136 [118 Educ. L. Rep. 846] (2d Cir. 1997).

[106] Julian Speer Co. v. Ohio State Univ., 680 N.E.2d 254 [118 Educ. L. Rep. 1135] (Ohio Ct. Cl. 1997).

In Illinois, a laborer who was struck by a backhoe while working on university property unsuccessfully sued the contractor and its employee who was operating the equipment. An appellate court affirmed that since the contractor's employee was a loaned employee, a tort action against him was barred due to the exclusive remedy provisions of workers' compensation.[307] In addition, the court indicated that the contractor was not liable under respondent superior because its employee could not be accountable in a civil action.

Strict Liability

After a university had a fire which started because of a grain dryer, it sued to recover damages from the manufacturer. When the summary judgment was granted in favor of the maunfacturer, the university appealed. The Eighth Circuit affirmed.[308] According to the court, the university was barred from tort recovery under the Uniform Commercial Code because it was a merchant with respect to the grain dryer. The court was of the opinion that even though the university was not a dealer, it had specialized knowledge of the grain dryer since it knew of risks and potential damage that could be caused in the event of the failure.

Damages for Defects

A state university sought indemnification under a procurement contract for work on a library on campus when it incurred additional costs due to errors and omissions in the architects' designs. A procurement officer ruled in favor of the university and the Board of Contract Appeals (BCA) agreed that the architects' subsequent challenge was untimely. On further review, the Court of Appeals of Maryland contended that the BCA lacked subject matter jurisdiction to hear the university's procurement contract claim.[309]

Provision of Wages

A state university brought a declaratory judgment action to ascertain whether the Prevailing Wage Act applied to a construction project for a student recreational facility. After lower courts agreed that the Act, which requires contractors to pay workers on public projects the wage rate prevailing in the locality, did not apply because state appropriations did not directly finance the project, the state appealed. The Supreme Court of Michigan reversed in noting that the statutory language "sponsored or financed in whole or in part by the state" applied because the university is an arm of the state government, thereby satisfying the Act's requirement that such a project must be sponsored and financed by the state.[310]

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[307] Willtong v. Dean Evans Co., 679 N.E.2d 1252 [119 Educ. L. Rep. 581] (Ill. App. Ct. 1997).

[308] Regents of the Univ. of Minn. v. Chief Indus., 106 F.3d 1409 [116 Educ. L. Rep. 108] (8th Cir. 1997).

[309] University of Md. v. MFE Inc./NCP Architects, 691 A.2d 676 [117 Educ. L. Rep. 617] (Md. 1997).

Negligence

Shortly after a priest ejected an armed, intoxicated man from a college chapel, the man shot a food service employee who was working on campus. The injured employee and her family appealed a jury verdict in favor of the college in her suit claiming that it, the priest, and various officials acted negligently by not warning others or calling campus security or local police about an armed, intoxicated intruder. The Supreme Court of Montana affirmed since it agreed that the verdict was supported by substantial credible evidence that the college did not breach its duty.[311]

An applicant for a maintenance job at a corporation took a pre-employment test on site at a state technical college. The test was administered by one of the school's employees. After the applicant slipped and fell, he sued a variety of defendents for negligence. After the defendants were granted summary judgment, the applicant appealed. The Supreme Court of Alabama affirmed that since the college's employee was not a borrowed servant of the corporation, it could not be liable for his actions.[312] At the same time, the court stated that the employee was not entitled to qualified immunity due to circumstances surrounding his inspection and cleaning of the test site.

In Indiana, a female student was raped by a fellow studnet in a foundation-owned co-educational house that both were required to live in because they had scholarships challenged an adverse grant of summary judgment. An appellate court affirmed that the foundation did not have the duty to protect the student from the actions of a third person because the rape was not reasonably foreseeable.[313] In addition, the court declared that the foundation fulfilled its duty by providing the student with a safe place to live and was not required to police the residents' activities.

A student who hurt his hand, fingers, and wrist in a bowling class disputed a judgment that the college was fifty-one percent negligent and he was forty-nine percent at fault. An appellate tribunal in Pennsylvania affirmed that the trial court properly calculated damages.[314]

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[310] Western Michigan Univ. Bd. of Control v. State, 565 N.W.2d 828 [119 Educ. L. Rep. 1122] (Mich. 1997).

[311] Peschke v. Carroll College, 929 P.2d 874 [115 Educ. L. Rep. 151] (Mont. 1996).

[312] Defoor v. Evesque, 694 So. 2d 1302 [119 Educ. L. Rep. 286] (Ala. 1997).

[313] L.W. v. Western Golf Ass'n, 675 N.E.2d 760 [115 Educ. L. Rep. 1030] (Ind. Ct. App. 1997).

Medical Malpractice

The estate of a patient who died at state university hospital appealed the dismissal of its medical malpractice claim. The Supreme Court of Kentucky affirmed.[315] The court agreed that the university, as an entity of the Commonwealth, was not deprived of sovereign immunity even though it performs many of the same functions as private hospitals.

In the first of two cases from New York, the insurance company that was representing eleven medical school professors against charges of malpractice unsuccessfully asked the state to provide their defense. An appellate court affirmed that the state did not have to defend the professors.[316] The court based its judgment on a collective bargaining agreement under which the professors waived the right to a state-provided defense.

Where the medical center at a public university failed to diagnose a student's cancer, he filed suit against the state alleging medical malpractice and negligence. Finding for the state, a trial court collapsed both claims into one for medical malpractice and decided that the statute of limitations had expired. An appellate court in New York reversed and remanded.[317] The court was of the opinion that since a separate cause of action did sound in negligence, the student's claim was not time barred.

In the first of two cases from Ohio, an inmate sued a doctor, who was also a faculty member at a state medical school, for performing unnecessary surgery on him because he confused him with another prisoner with a similar name. A trial court believed that the physician was immune from liability, but an appellate tribunal reversed and remanded.[318] The court reflected that the doctor was not entitled to immunity because he was not considered a state employee at the time of the alleged malpractice insofar as was not functioning under a personal services contract with a department, agency, or institution of the state.

A patient who underwent open-heart surgery and her spouse sued a state university for vicarious liability, alleging negligence on the part of two physicians involved in her operation. A trial court partially denied the physicians' motion for immunity. On further review, an appellate court in Ohio affirmed that since one of the physicians was acting outside the scope of his employment as a university professor at the time he performed the operation, he was not entitled to immunity.[319] At the same time, the court reversed and held that the other physician, who was chief of the surgery department, was entitled to immunity because he did not take part in the patient's treatment and did not act outside of the scope of his employment in referring the woman to the other doctor.

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[314] Liberty v. Geneva College, 690 A.2d 1243 [117 Educ. L. Rep. 188] (Pa. Super. Ct. 1997).

[315] Withers v. University of Ky., 939 S.W.2d 340 [116 Educ. L. Rep. 1257] (Ky. 1997).

[316] Frontier Ins. Co. v. Koppell, 648 N.Y.S.2d 812 [113 Educ. L. Rep. 1275] (N.Y. App. Div. 1996).

[317] Barresi v. State, 649 N.Y.S.2d 207 [114 Educ. L. Rep. 269] (N.Y. App. Div. 1996). App. 1996).

[318] Smith v. Ohio State Univ. Hosps., 674 N.E.2d 721 [115 Educ. L. Rep. 69] (Ohio Ct.

Antitrust

Five former and current football players in Washington appealed a grant of summary judgment in their suit against their athletic conference which claimed that it violated the Sherman Act and committed a breach of contract by imposing harsh sanctions on the university for rules violations. The Ninth Circuit affirmed that the athletes failed to support their argument that the penalties were grossly disproportionate to the university's violations.[320] As to the breach of contract claim, the court observed that athletes cannot be considered third-party beneficiaries of the pact between the conference and its university members since they were unable to establish that the parties intended to create direct legal obligations between themselves and students.

NCAA Division I colleges and universities sought a writ of prohibition to vacate a federal district court's order that they respond to interrogatories.[321] The Tenth Circuit granted the writ since the plaintiffs were not parties to action who could be ordered to respond to interrogatories and were entitled to Eleventh Amendment immunity for discovery purposes.

Patents

Publishers sued a copy shop in Michigan that reproduced and sold "coursepacks" to students since it did not pay royalties or commission fees. After a federal district ruled in favor of the publishers, a three-judge panel of the Sixth Circuit reversed. In an en banc rehearing, the court affirmed that the copy shop's commercial exploitation of copyrighted materials or preparation of coursepacks was not fair use.[322]

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[319] Balson v. Ohio State Univ., 677 N.E.2d 1216 [117 Educ. L. Rep. 278] (Ohio Ct. App. 1996).

[320] Hairston v. Pacific 10 Conference, 101 F.3d 1315 [114 Educ. L. Rep. 771] (9th Cir. 1996).

[321] University of Tex. at Austin v. Vratil, 96 F.3d 1337 [112 Educ. L. Rep. 700] (10th Cir. 1996).

[322] Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381 [114 Educ. L. Rep. 34] (6th Cir. 1996).

However, for purposes of awarding statutory damages, the court reversed in pointing out that the infringement was not willful.

In the first of three related suits, a company sought a declaratory judgment against a state university over a patent that the latter owned. A federal district court in Indiana granted the university's motion to dismiss based on lack of jurisdiction under the Eleventh Amendment.[323] The court posited that the state did not waive its sovereign immunity.

When the company sought a declaration that a patent relating to human growth hormone was invalid, unenforceable, and noninfringed, it also charged that the university breached its third-party beneficiary obligations in connection with proposed licensing of the patent. In addressing only the third-party beneficiary claim, a federal district court in Indiana granted the university's motion for summary judgment.[324] The court determined that the company was not a third-party beneficiary of a license agreement between the university and its licensee because the parties rescinded that agreement before the company either assented to or relied on the contract.

In the third case, the university appealed an order from the federal district in Indiana requiring it to produce the deposition communications of three attorneys. The Federal Circuit vacated in favor of the university.[325] The court reasoned that since the legal advice and communications were protected by the doctrine of joint client and community of interest, they were subject to the attorney-client privilege.

Former faculty members in California sued the regents and its patent licensee alleging that they were entitled to fifty percent of the royalties from the invention they assigned to it rather than the fixed amount they received. When both sides moved for summary judgment, a federal district court held, in essence, that the faculty members were not entitled to the royalties.[326] The court indicated that the university's patent policy statement, which was incorporated by reference into patent and license agreements between the parties, did not require it to obtain a royalty for patents or inventions.

In a second case from California, the state board of regents challenged a judgment in favor of a professor which stated that the university could not change the terms of their patent agreement without his written consent. On further review, an appellate court affirmed.[127] The court agreed that since the university's patent policy was incorporated into the professor's agreement with it, he was entitled to fifty percent of the net royalties.

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[323] Genentech v. Regents of Univ. of Cal., 939 F. Supp. 639 [113 Educ. L. Rep. 726] (S.D. Ind. 1996).

[324] Genentech v. Regents of the Univ. of Cal., 952 F. Supp. 617 [116 Educ. L. Rep. 276] (S.D. Ind. 1996).

[325] *In re* Regents of Univ. of Cal., 101 F.3d 1386 [114 Educ. L. Rep. 780] (Fed. Cir. 1996).

[326] Kucharczyk v. Regents of Univ. of Cal., 946 F. Supp. 1419 [114 Educ. L. Rep. 1118] (N.D. Cal. 1996).

The licensee spin-off corporation of a debtor corporation that sold software designed to assist colleges and universities with their administrative functions was comprised of about twenty-five colleges and universities. When the debtor corporation granted licensing rights to a new licensee, the spin-off corporation sought a declaratory judgment regarding its exclusivity rights. The bankruptcy court in New Jersey ruled in favor of the debtor corporation.[128] According to the court, the spin-off corporation could not enforce the exclusivity provisions since the agreement expired prior to the debtor's filing of a petition for liquidation under Chapter 7 of the Bankruptcy Code.

A second case from New Jersey involved a bank who offered certificate of deposits that guaranteed a return to cover future college expenses. When the bank learned a corporation in Florida offered a similar financial package, it sued the corporation for patent infringement and false advertising under the Lanham Act. The federal district court decreed that since the corporation was an arm of the state for the purpose of the Eleventh Amendment, it was entitled to immunity.[129]

In New York, a university sued a health care service provider for trademark infringement. A federal district court dismissed the claim since the mark, which happened to be the name of the university, was not likely to be confused with the provider's.[130] The court added that the university failed to establish either ownership of a distinctive mark or the likelihood that it would be diminished by the health care provider's use of the same.

Where a trial court granted a plaintiff's petition for judicial dissolution of a corporation, the defendant sought further review on the ground that it awarded property that it did not own. An appellate court affirmed that the corporation, not the university, owned the patent for the implantable hearing device.[131]

The administrator of a computerized version of a standardized graduate admissions test sued a test preparation firm for copyright infringement and breach of contract. The test firm had its employees take computerized versions of the examination, attempt to memorize questions, and recreate them for the company. When the test firm noticed that certain questions reappeared, it informed a variety of deans that the instrument's validity had been called into question. The federal trial court in Maryland maintained that questions of fact over whether the test firm's activities were fair use precluded a motion for summary judgment over whether it violated the law.[332] As to the breach of contract claim, the court decided that the administrator failed to state a claim upon which relief could be granted.

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[127] Shaw v. Regents of the Univ. of Cal., 67 Cal. Rptr. 2d 850 [121 Educ. L. Rep. 261] (Cal. Ct. App. 1997).

[128] *In re* AGI Software, 199 B.R. 850 [112 Educ. L. Rep. 260] (Bankr. D.N.J. 1995).

[129] College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400 [115 Educ. L. Rep. 699] (D.N.J. 1996).

[130] Trustees of Columbia Univ. v. Columbia/HCA Healthcare Corp., 964 F. Supp. 733 [118 Educ. L. Rep. 994] (S.D.N.Y. 1997).

[131] Lesinski v. Henderson, 677 N.E.2d 1239 [117 Educ. L. Rep. 289] (Ohio Ct. App. 1996).

A university, two professors, and others sued a corporation for patent and copyright infringement, fraud, and unjust enrichment for allegedly using the faculty members' invention of a prenatal multivitamin supplement to obtain a patent. The federal district court in Colorado entered judgment in favor of the corporation on the patent infringement claim.[333] At the same time, the court found in favor of the plaintiffs on the copyright infringement, fraud, and unjust enrichment claims.

Estates and Wills

A university appealed a ruling in favor of a donor who sought to enjoin it from using his charitable gift, designed to provide scholarships for "medical related education," for purposes other than for which it was intended. In fact, the donor obtained an injunction when the university closed its nursing school. The Supreme Court of Connecticut reversed in favor of the university.[334] The court held that the state's Uniform Management of Institutional Funds Act did not implicitly provide the donor with standing to enforce an unreserved restriction in a completed charitable gift.

Conclusion

The summaries of case law in this chapter provide an excellent perspective on the issues surrounding the implementation of federal and state policies within higher education. The reviews also offer a tool for administrators and practitioners on problems and pitfalls they may face when making employment decisions. In addition, case law offers an excellent source for the kinds of scenarios to avoid in the administration of institutions, departments, or other administrative units.

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[332] Educational Testing Serv. v. Stanley H. Kaplan, Educ. Ctr., Ltd., 965 F. Supp. 731 [119 Educ. L. Rep. 119] (D. Md. 1997).

[333] University of Colo. Found. v. American Cyanamid Co., 974 F. Supp. 1339 [121 Educ. L. Rep. 204] (D. Colo. 1997).

[334] Carl J. Herzog Found. v. University of Bridgeport, 699 A.2d 995 [120 Educ. L. Rep. 1087] (Conn. 1997).

It is interesting to watch the ebb and flow of issues over the years. As in the past, sexual harassment continued to receive a great deal of attention. Cases involving employee to employee and employee to student sexual harassment continue to be heavily litigated as the case law clarifies the implementation of harassment policies in higher education. Other issues that are receiving increased attention include patents, estates, and wills. This review is truly a barometer of the key issues that were litigated in higher education over the past year.

9

STUDENTS IN HIGHER EDUCATION

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Introduction

Many common themes dominated litigation involving students in higher education. Students continued to challenge the discretionary authority of academic officials and frequently sought to use federal anti-discrimination laws to support their claims. Generally, however, institutions of higher learning prevailed as, for the most part, courts have been satisfied to let the judgment of university officials in academic concerns stand.

Institutions questioned the authority of regulatory agencies, state and federal laws, and the courts. Focusing on the clarification of procedural questions or the interpretation of state and federal laws, these cases emphasized the importance of acting in good faith and within the respective authority of the decision maker.

Admission or Matriculation

Admission

In the first of two cases from Virginia, a plaintiff unsuccessfully tried to compel a university to retain him in a postbaccalaureate program designed for economically disadvantaged and minority students who were preparing to enter medical school. The student claimed that university officials violated the Americans with Disabilities Act[1] (ADA), Section 504 of the Rehabilitation Act,[2] and state law when he was dismissed from the program. The initial trial court decision upheld the action of the faculty in light of the student's academic record, the important responsibility shouldered by the medical profession, and the absence of procedural and substantive due process violations.[3] Subsequently, the same court refused to substitute its judgment for that of the faculty.[4]

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[1] 42 U.S.C. § 12101 *et seq.*

[2] 29 U.S.C. § 794 (a)

Another student in Virginia sought admission to a graduate program under Section 504 and the ADA because of an alleged disability. Noting that the student's undergraduate grade point average failed to meet the school of social work's requirement for admission, the court rejected his argument that it should have considered his practical experience in the field, his grade point average in his junior and senior years, and his additional postgraduate college work. The court observed that the plaintiff did not argue that the school had admitted other students, with or without disabilities, who had similar qualifications but lacked the minimum required undergraduate grade point average. Moreover, the court pointed out that the student did not allege that the minimum grade point average requirement disparately affected persons with disabilities. Reasoning that he failed to show he was otherwise qualified for admission and could not state a proper cause of action, the court dismissed the student's pro se case.[5]

In New York, a student who suffered from anxiety disorder, social phobia, and panic attacks sought to attend a master's program by telephone. University officials found telephone conferencing was not the academic equivalent to participation through physical presence and did not admit the student. He claimed the university violated the ADA and state law in refusing his request. The court found it was the severe nature of the student's condition and not the university's failure to offer reasonable accommodation that limited his ability to achieve his educational objectives. Futher, the court concluded that allowing the student to participate in the program via a telephone would have been a substantial modification of the program[6] and thus denied the student's request for an injunction.

Matriculation

Similar to cases involving admissions, courts trusted the judgment of academic officials who made adverse decisions about students who were currently enrolled. A white male student at a university in New Jersey attempted to compel his admission to medical school after completing his undergraduate studies in a joint bachelor/medical degree program. The student argued that university officials deprived him of his right to substantive and procedural due process, equal protection, and discriminated against him because of his race and gender in violation of titles VI and VII of the Civil Rights Act of 1964[7] and a state anti-discrimination law. University officials responded that the student's undergraduate degree grades were not high enough for advancement to medical school. The federal trial court granted the university's motion for summary judgment.[8] Essentially, the court held that university officials used accepted academic standards in exercising their professional judgment, that they reached their decision carefully and deliberately, and that they did not discriminate against the plaintiff or favor other students of different gender or ethnicity. The court refused to substitute its judgment for that of university officials when it reviewed the student's consistently poor grades and his repeated failure to display the maturity, dedication, and nonacademic qualities expected of participants in the highly competitive joint program. The court decided that university officials offered the student many opportunities to improve his grades, but he chose to ignore their advice.

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[3] Betts v. Rectors and Visitors of Univ. of Va., 939 F. Supp. 461 [113 Educ. L. Rep. 705] (W.D. Va. 1996).

[4] Betts v. University of Va., 967 F. Supp. 882 [119 Educ. L. Rep. 470] (W.D. Va. 1997).

[5] Gent v. Radford Univ., 976 F. Supp. 391 [121 Educ. L. Rep. 738] (W.D. Va. 1997).

[6] Maczaczyj v. State of N.Y., 956 F. Supp. 403 [117 Educ. L. Rep. 134] (W.D.N.Y. 1997).

A student in New York sought to enjoin the Educational Testing Service (ETS) from canceling her score on the Graduate Record Examination based on its claim that the substantial similarity between her answers and those of another test taker supported an allegation of cheating. The disputed score enabled the student to gain admission to a graduate program from which she probably would have been expelled if the ETS informed the university of its cancellation of the score. The parties agreed that ETS had destroyed the student's two test booklets. Arguing that notations in her test booklets would prove that she had not cheated, the student accused the ETS of failing to meet an implicit duty of good faith and fair dealing. Acknowledging that ETS' destruction of evidence created a triable issue of its good faith efforts to conduct a full investigation of the student's alleged academic dishonesty, combined with her reasonable probability of success, the court granted her request for an injunction.[9]

The issue of a nonacademic entity exercising academic judgment arose in Connecticut where a student athlete sought to enjoin the National Collegiate Athletic Association (NCAA) from interfering with his ability to compete in a university basketball program and from receiving financial and scholarship aid. The question was whether the NCAA's initial eligibility clearinghouse or the student's high school principal had the authority to decide whether a class he took in high school qualified as a core course. The federal trial court posited that the student, his school, and university complied with NCAA regulations governing the qualifications of athletes to meet the academic challenges in higher education. In determining that the NCAA exceeded its authority in overruling the principal's core-course designations, the court granted the student's request for an injunction.[10] On appeal, the Second Circuit remanded the dispute to the district court to correct its failure to apply principles of good faith and fair dealing as defined by state contract law.[11]

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[7] 42 U.S.C. §§ 2000d and 2000e *et seq.*

[8] Van de Zilver v. Rutgers Univ., 971 F. Supp. 925 [120 Educ. L. Rep. 690] (D.N.J. 1997).

[9] Cortale v. Educational Testing Serv., 656 N.Y.S.2d 154 [117 Educ. L. Rep. 710] (N.Y. Sup. Ct. 1997).

A case from California involved an uncommon set of facts in higher education wherein a mother sued a university alleging that its failure to admit her daughter to its elementary laboratory school violated title VI and section 1983.[12] Officials responded that the university's use of race and ethnicity admissions criteria were narrowly tailored to accomplish a compelling state interest. Even though the trial court granted the mother's request for an injunction to admit her daughter, the judge ruled that the university's interest in operating a laboratory school to conduct research relevant to the improvement of the state's public education system was compelling.[13] This case is important because a judicial reviewer deferred to educators' interest in maintaining their academic freedom to conduct research.

Tuition and Fees

Residency

Two students in North Carolina attempted to overturn a decision upholding a university's denial of their applications for state residency for tuition purposes. An appellate court affirmed on the basis that substantial evidence supported the judgment of university officials that both students had neither lived in the state for five consecutive years nor had a full-time or permanent job, and that their respective parents lived out of state.[14] Moreover, the court asserted that the procedures the officials used afforded the students sufficient due process.

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[10] Phillip v. National Collegiate Athletic Ass'n, 960 F. Supp. 552 [118 Educ. L. Rep. 208] (D. Conn. 1997).

[11] Phillip v. Fairfield Univ., 118 F.3d 131 [119 Educ. L. Rep. 798] (2d Cir. 1997).

[12] 42 U.S.C. § 1983.

[13] Hunter by Brandt v. Regents of Univ. of Cal., 971 F. Supp. 1316 [120 Educ. L. Rep. 705].

[14] Norman v. Cameron, 488 S.E.2d 297 [120 Educ. L. Rep. 321] (N.C. Ct. App. 1997).

In Arkansas, an immigrant citizen of Uruguay who married a naturalized United States citizen sought resident tuition status. The university officials denied her petition because she entered the United States under a nonimmigrant student visa. A federal court decreed that university officials did not violate the student's rights because she could have requested an adjustment of her visa status before applying for in state tuition status.[15]

Financial Aid

Institutional Eligibility

Federal Qualifications

Nine financial institutions filed suit in the District of Columbia successfully challenging the Secretary of Education's (Secretary) refusal to pay them sixteen million dollars in statutory special allowances for government-funded student loans. Special allowances cover the difference between the interest established by statute on student loans and market rates. After reviewing the legislative history of the Guaranteed Student Loan Program[16] and applying the *Chevron*[17] analysis for examining an agency's interpretation of a statute it administers, the court granted the plaintiffs' motion for summary judgment.[18] The court was of the opinion that the statute clearly stated the applicable interest rate for calculating any special allowances due to Stafford Loan lenders during the conversion period.

In contrast, the Connecticut Student Loan Foundation (CSLF) unsuccessfully contested the Secretary's authority to set the guarantee rate for students loans.[19] The CSLF argued that the Student Loan Reform Act of 1993[20] modified federal law governing student loans[21] and gave it discretion to guarantee such loans at any rate between 98 and 100% despite the Secretary's promulgation of regulations requiring agencies to insure loans only at 98%. The district court adopted a Magistrate's recommendation that the law requiring agencies to insure loans at "no less than

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[15] Hein v. Arkansas St. Univ., 972 F. Supp. 1175 [120 Educ. L. Rep. 1036] (E.D. Ark. 1997).

[16] 20 U.S.C. §§ 1071–1087–2.

[17] Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842–43 (1984).

[18] Bank of America v. Riley, 940 F. Supp. 348 [113 Educ. L. Rep. 1133] (D.D.C. 1996).

[19] Connecticut Student Loan Found. v. Riley, 948 F. Supp. 156 [115 Educ. L. Rep. 675] (D. Conn. 1996).

[20] Pub. L. No. 103–66 title IV, Subtitle A.

[21] 20 U.S.C. § 1078(b)(1)(G).

98%" was ambiguous but that the Secretary's regulation requiring guaranty agencies to insure loans at 98%, no more and no less, was a permissible interpretation of the statute's risk-sharing provisions.

Three technical training schools in Michigan were unable to convince a federal court judge that the Secretary's policy of not considering prepublication cohort default rate (CDR) data as the most recent data available violated the Higher Education Act (HEA).[22] Moreover, the schools were unable to show that the Secretary's policy of CDR determination and application violated equal protection or that the practice of calculating Federal Family Education Loan eligibility violated the law[23] requiring the Department of Education to apply its regulations uniformly throughout the country.[24]

Four cases from New York involved challenges to the Secretary's authority to prevent them from participating in federal student loan programs. In the first, two beauty schools failed to demonstrate that the Secretary exceeded his authority by allegedly violating nondiscretionary duties in calculating and publishing cohort default rates or had deprived them of due process.[25]

In the second action from New York, a business school prevailed in its claim that the Secretary acted arbitrarily and capriciously in relying on entries "skip determined" and "skip start" in the computer records of the guarantee agency that paid claims to lenders to ascertain whether the requisite skip tracing had been performed. The court ordered the school's reinstatement in the Federal Family Education Loan program pending the Secretary's reconsideration and final decision.[26] In contrast, two other courts in New York declared that the owners of a food and hotel management program[27] and a chauffeur training school[28] could not establish that the Secretary acted arbitrarily and capriciously in denying them the opportunity to participate in federal student loan programs in light of liabilities they owed the government.

A proprietary school in Pennsylvania raised similar questions about the Secretary's termination of its participation in the Federal Family Education Loan program because of a high CDR. According to the court, the Secretary did not have to treat the school's most recent prepublication rate as a CDR for one of the three most recent fiscal years for which data were available.[29]

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[22] 20 U.S.C. § 1085 *et seq.*

[23] 20 U.S.C. § 1232(c).

[24] Ross Learning v. Riley, 960 F. Supp. 1238 [118 Educ. L. Rep. 247] (E.D. Mich. 1997).

[25] Calise Beauty Sch. v. Riley, 941 F. Supp. 425 [113 Educ. L. Rep. 1214] (S.D.N.Y. 1996).

[26] Mildred Elley Bus. Sch. v. Riley, 975 F. Supp. 434 [121 Educ. L. Rep. 591] (N.D.N.Y. 1997).

[27] New York Inst. of Dietetics v. Riley, 966 F. Supp. 1300 [119 Educ. L. Rep. 428] (S.D.N.Y. 1997).

[28] Chauffeur's Training Sch. v. Riley, 967 F. Supp. 719 [119 Educ. L. Rep. 452] (N.D.N.Y. 1997).

State Agency Qualifications

A suit in Michigan pitted the state and its educational trust against the federal government. The plaintiffs sought interest on income tax refunds after a ruling that the trust, which was established to give parents a prepaid tuition plan for up to four years of a college education, was not subject to federal taxation. A federal trial court indicated that since the Internal Revenue Service (IRS) correctly calculated and paid the interest, the plaintiffs were not entitled to interest beyond that which the IRS had already paid.[30]

Procedures and Qualifications

A federal district court in Arizona addressed whether the anti-discrimination rules of the HEA preempted the state law claims of plaintiffs against secondary purchasers of student loans. The plaintiffs claimed that they took out guaranteed student loans and enrolled in a court reporting program based on the school's misrepresentations. The court maintained that since the HEA does not give secondary purchasers the authority to investigate schools and because they cannot refuse a loan based on the school the students attended, the secondary purchasers could not comply with both the HEA and the state law that allegedly subjected them to liability since the HEA prohibited them from being holders in due course.[31] Thus, the court believed that the HEA preempted the students' state law claim that subjects secondary purchasers, as nonholders in due course, to liability for defenses against payment of the loans. The court added that the HEA further preempted the students' state law claims because seeking injunctive and declaratory relief against secondary market purchasers of student loans was an obstacle to the full purpose and objective established by Congress in the HEA.

A federal district court's in Colorado confirmed the authority of the Secretary to require a community college to reimburse the government for certain Pell grants and defaulted loans awarded to students at a correctional facility. The court sustained an administrative law judge's finding that it is reasonable for the Secretary to require colleges/universities to notify his office of the opening of an additional location as a condition for awarding federal financial aid to students attending the new location.[32] The court noted that just because state law may have required the college to establish an operation at the correctional facility did not mean that an auxiliary site did not need prior approval. The court also wrote that sufficient evidence supported the judge's adjudication that the college violated the contracting out regulation with respect to its truck-driving program.

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[29] American Inst. of Design v. Riley, 969 F. Supp. 936 [120 Educ. L. Rep. 468] (E.D. Pa. 1997).

[30] Michigan v. United States, 950 F. Supp. 205 [115 Educ. L. Rep. 896] (W.D. Mich. 1996).

[31] Crawford v. American Inst. of Prof'l Careers, 934 F. Supp. 335 [112 Educ. L. Rep. 222] (D. Ariz. 1996).

A student failed to establish a private cause of action under the HEA. The federal district court rejected the student's claims that the Connecticut Student Loan Foundation violated the HEA and that his Fourteenth Amendment rights to due process and equal protection were infringed upon when his loan application was denied.[33]

In California, an association of cosmetology schools persuaded the Ninth Circuit to enjoin the Secretary from enforcing amendments to tuition-refund regulations under the HEA. The schools alleged that the Secretary exceeded his authority in issuing regulations governing the amount of tuition and other fees postsecondary schools must refund to the Department of Education when students receiving title IV federal aid withdraw from classes before completing the term for which those fees were charged.[34] The court affirmed that adding unpaid charges to the amount schools must refund adds language to the HEA that Congress did not intend.

When a plaintiff filed suit in the District of Columbia to obtain documents from the Department of Education under the Freedom of Information Act,[35] the court decided that trigger figures, error rates, and dollar amounts of potential fines for mismanagement of title IV funds were exempt from disclosure as being within a "high 2" classification.[36] The court pointed out that "high 2" information refers to internal matters, the disclosure of which would risk circumvention of the law.

In a second case from the District of Columbia, the Student Loan Marketing Association (Sallie Mae) disputed the Secretary's interpretation that an amendment to the HEA allowed him to impose an offset fee on the principal amount of any loan in which Sallie Mae has a financial interest, especially securitized loans.[17] Sallie Mae sued, alleging that the fee was a taking without just compensation and that the Secretary's claim that it applied to securitized loans ran counter to the unambiguous meaning of the law. The Circuit Court of Appeals affirmed the denial of Sallie Mae's taking claim but invalidated the Secretary's attempt to apply the fee to securitized loans. Reasoning that the Secretary had not applied a correct understanding of holds in reviewing the amendment's possible coverage of loans securitized by Sallie Mae, the court remanded the dispute to the Secretary for further consideration.

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[32] Morgan Community College v. Riley, 968 F. Supp. 1411 [119 Educ. L. Rep. 969] (D. Colo. 1997).

[33] Waugh v. Connecticut Student Loan Found., 966 F. Supp. 141 [119 Educ. L. Rep. 386] (D. Conn. 1997).

[34] California Cosmetology Coalition v. Riley, 110 F.3d 1454 [117 Educ. L. Rep. 454] (9th Cir. 1997).

[35] 5 U.S.C.A. § 522 (b)(2).

[36] Wiesenfelder v. Riley, 959 F. Supp. 532 [118 Educ. L. Rep. 72] (D.D.C. 1997).

In New Jersey, a class action suit raised the issue of whether a school, lenders, guarantee agencies, and the Secretary induced students to procure loans through false representations. The lead plaintiff, an unemployed mother of three children, based her claim on misrepresentations a vocational school made about the benefits of its educational program and its placement rates. Despite perfect attendance and graduation with a "B" average, contact with the school's placement office, and her own efforts, the woman was unable to find a job as a computer operator after graduation. In a complicated procedural opinion, the court held that the Federal Trade Commission Holder Rule,[18] which precludes a seller of goods or services from accepting a consumer credit contract as payment under certain circumstances unless it includes a clause by which claims and defenses against the seller are made available against the holder, was applicable to guaranteed student loans before the Secretary issued a requirement that such language be included in promissory notes evidencing student loans.[19] The court concluded that while the woman could not rely on state common law of assignment to raise fraud claims against the school as a defense to her loan repayment obligation to the lender and its assignees, the loan notes were subject to the defenses she had against the lender.

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[17] Student Loan Marketing Ass'n v. Riley, 104 F.3d 397 [116 Educ. L. Rep. 24] (D.C. Cir. 1997).

[18] Federal Trade Commission Act, § 1 *et seq.*; 15 U.S.C.A. § 41 *et seq.*; Consumer Credit Protection Act, § 102 *et seq.*; 15 U.S.C.A. § 1601 *et seq.*; 12 C.F.R. § 226.1 *et seq.*; 16 C.F.R. § 433.1 *et seq.*

[19] Morgan v. Markerdowne Corp., 976 F. Supp. 301 [121 Educ. L. Rep. 706] (D.N.J. 1997).

Bankruptcy

Chapter 7[40]

A school of dentistry in Massachusetts learned a costly lesson when its failure to follow written procedures precluded it from establishing that a student's debt was a loan within the meaning of the statutory exception to discharge obligations arising out of educational loans. Entering a judgment on behalf of the debtor, the bankruptcy court stated that in extending credit to a needy student by waiving the standard requirement of prepaid tuition, the school did not advance any funds.[41] Thus, the court contended that the school did not create a loan within the meaning of the statute.

In a case from California, the bankruptcy court for Ninth Circuit reversed in favor of a debtor.[42] The court judged that a retroactive forbearance agreement created after the lender had seven years in which to recover three student loans was an inapplicable suspension of the repayment period for the purposes of the bankruptcy code.

The Department of Education challenged a decision that a debtor's student loan was dischargeable in bankruptcy.[43] The federal district court in Nebraska agreed that the loan became due, for the purpose of the bankruptcy statute permitting the discharge of student debt, when the grace period for repayment expired, not when the debtor's first installment payment was due under the terms of the loan coupon book.[44]

A variety of courts reviewed cases in which Chapter 7 debtors sought undue hardship discharges of their student loan debts. Debtors did not obtain favorable rulings where they failed to establish a claim for relief,[45] their debt was not excepted from discharge,[46] or their obligations as cosigners on their children's student loans were not dischargeable.[47] Further, while refusing to discharge his loans, a bankruptcy court in Florida observed that a doctor who could not practice due to a mental illness was entitled to a two-year moratorium from collection and accrual of interest.[48]

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[40] 11 U.S.C. § 523(a)(8) (1994).

[41] *In re* DePasquale, 211 B.R. 439 [120 Educ. L. Rep. 739] (Bankr. D. Mass. 1997).

[42] *In re* Manriquez, 207 B.R. 890 [118 Educ. L. Rep. 346] (9th Cir. B.A.P. 1996).

[43] *In re* Scott, 213 B.R. 156 [121 Educ. L. Rep. 765] (Bankr. D. Neb. 1997).

[44] *In re* Scott, 213 B.R. 159 [121 Educ. L. Rep. 768] (D. Neb. 1997).

[45] *In re* Kring, 208 B.R. 73 [118 Educ. L. Rep. 350] (Bankr. S.D. Cal. 1997); *In re* Holmes, 205 B.R. 336 [116 Educ. L. Rep. 282] (Bankr. M.D. Fla. 1997).

[46] United States v. Erkard, 200 B.R. 152 [112 Educ. L. Rep. 273] (N.D. Ohio 1996); *In re* Shorts, 209 B.R. 818 [119 Educ. L. Rep. 510] (Bankr. D.R.I. 1997).

[47] *In re* Karben, 201 B.R. 681 [113 Educ. L. Rep. 1249] (Bankr. S.D.N.Y. 1996).

[48] *In re* Dennehy, 201 B.R. 1008 [113 Educ. L. Rep. 1254] (Bankr. N.D. Fla. 1996).

In other Chapter 7 cases, at least one debtor was able to establish that undue hardship merited the discharge of her student loan.[49] A bankruptcy court in Missouri posited that a debtor was entitled to a hardship discharge of a debt in excess of $100,000 that she accumulated while obtaining an advanced management degree.[50] The court was of the view that the woman's obligation to repay the debt would impose an undue hardship on her and her dependents where her annual income in the five years since obtaining her degree never exceeded $11,000 and was insufficient to allow her to support herself or her family. Moreover, the court acknowledged that the debtor's health problems and possible criminal liability for parental kidnaping proved that her financial prospects were not likely to improve to the extent that she could repay loans. The court also considered the debtor's good faith efforts of trying to obtain employment, reducing her expenses, and making such payments as she could afford.

At least two rulings were strikingly different concerning the discharge of student debt. A bankruptcy court in New York asserted that a fifty-four-year-old single parent of a nineteen-year-old autistic child was entitled to discharge of all but $5,000 of her more than $17,000 student loan.[51] The court thought the debtor was not entitled to an undue hardship discharge of her entire debt since it believed the woman, who suffered from a variety of illnesses, could pay the $5,000 without undue hardship.

Conversely, a bankruptcy court in Tennessee discharged all of a couple's more than $33,000 student debt despite their failure to make a single payment before filing for bankruptcy.[52] The court decreed that although the debtors' annual income of more than $36,000 was considerably in excess of property income guidelines of $17,710 for a family of five, this did not preclude an undue hardship discharge.

Chapter 13[53]

Even though courts considered fewer actions involving Chapter 13 bankruptcy claims, the issues were no less complicated than those in Chapter 7 cases. A bankruptcy court in Ohio distinguished between a claim and a debt in declaring that the timing of the determination of dischargeability is not relevant in evaluating whether a creditor possessing a nondischargeable obligation is entitled to postpetition interest. The court held that postpetition interest on a nondischargeable student loan could be collected from the debtors personally, even after they had fully paid the guarantor's allowed claims and were granted discharges under Chapter 13.[54]

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[49] *In re* Foley, 204 B.R. 582 [115 Educ. L. Rep. 367] (Bankr. M.D. Fla. 1996).
[50] *In re* Clevenger, 212 B.R. 139 [120 Educ. L. Rep. 1053] (Bankr. W.D. Mo. 1997).
[51] *In re* Wetzel, 213 B.R. 220 [121 Educ. L. Rep. 772] (Bankr. N.D.N.Y. 1996).
[52] *In re* Hornsby, 201 B.R. 195 [113 Educ. L. Rep. 306] (Bankr. W.D. Tenn. 1995).
[53] 11 U.S.C.A. § 523(a)(8)(A).

A bankruptcy court in Alabama maintained that the conversion of a claim from Chapter 13 to Chapter 7 did not establish a new filing date. As such, the court reflected that this had no effect on the prohibition of the dischargeability of the debt caused by the provisions of the bankruptcy code.[55]

In Georgia, a bankruptcy court reminded the defendant holder of a student loan debt that the discharge of such a debt is not an "all-or-nothing" proposition. The court offered that the Chapter 13 debtor's failure to make any payments on her student loan debt did not prohibit it from deciding that she made a good-faith effort to repay her loans.[56] Therefore, the court discharged all but $40,000 of the debt.

Chapter 11[57]

A bankruptcy court in Washington court ruled that a debtor's failure to use funds from her divorce settlement to pay down her loans did not constitute bad faith.[58] At the same time, a debtor in Alabama failed to convince a bankruptcy court of the dischargeability of his student loans because he did not achieve his goal of ordination as a Catholic priest.[59]

Service Contracts

Both the Fifth Circuit[60] and a federal district court in New York[61] rejected claims from physicians. The courts agreed that the six-year statute of limitations did not bar the government from collecting damages on defaulted National Health Services Corps scholarship obligations.

Collection

Student loan debtors had mostly negative results trying to prevent collections. In fact, in the only case decided on behalf of a debtor, a former student in Pennsylvania prevailed when she proved that she paid her loan more than twenty years earlier.[62]

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[54] *In re* Wagner, 200 B.R. 160 [112 Educ. L. Rep. 277] (Bankr. N.D. Ohio 1996).
[55] *In re* Green, 212 B.R. 160 [120 Educ. L. Rep. 1062] (Bankr. N.D. Ala. 1997).
[56] *In re* Rivers, 213 B.R. 616 [121 Educ. L. Rep. 780] (Bankr. S.D. Ga. 1997).
[57] 11 U.S.C.A. § 523(a)(8)(A).
[58] *In re* Hinkle, 200 B.R. 690 [112 Educ. L. Rep. 948] (Bankr. W.D. Wash. 1996).
[59] *In re* O'Flaherty, 204 B.R. 793 [115 Educ. L. Rep. 954] (Bankr. N.D. Ala. 1997).
[60] United States v. Bloom, 112 F.3d 200 [117 Educ. L. Rep. 887] (5th Cir. 1997).
[61] United States v. Kokayi, 968 F. Supp. 870 [119 Educ. L. Rep. 928] (E.D.N.Y. 1997).
[62] Finnegan v. Pennsylvania Higher Educ. Assistance Agency, 690 A.2d 1282 [117 Educ. L. Rep. 198] (Pa. Commw. Ct. 1997).

The Supreme Court of Iowa rejected an inmate's argument that he had a constitutional right to use private funds to pay for educational costs rather than pay restitution debt.[63] In Louisiana, an appellate court indicated that the thirty-year prescriptive period in a state law for debts owed to educational institutions controlled over the five-year limit for actions on promissory notes.[64] A chiropractor failed to convince a federal trial court in the District of Columbia that a statute of limitations barred the government's action to collect on his defaulted student loans.[65] In Ohio, an appellate court affirmed that since a dental student did not have to complete her residency before beginning her practice, the lender did not breach its contract by refusing to defer her loan repayment during her residency.[66] A Florida man failed to establish that the Texas corporation he owed a student loan debt to was subject to the state's long-arm jurisdiction.[67]

In the first of two cases from New York, a dentist could not convince a federal trial court that he did not have to repay his student loans due to alleged fraud by his former schools.[68] In the second, a trial court established that a borrower's failure to fulfill her duty to maintain a current mailing address with a collection agency until she satisfied her debt was a waiver of the jurisdictional defense of lack of service.[69]

The Ninth Circuit[70] and the federal trial court in Maryland[71] ruled favorably on the collection authority of the HEA. Both courts agreed that the HEA provides sufficient due process and preempts state wage garnishment statutes.

An appellate court in Louisiana overturned a finding that a state student financial assistance commission had to reimburse a bank for a default claim. The court noted that the trial judge disregarded the federal laws, regulations, and guidelines applicable to the Guaranteed Student Loan program.[72] As such, the court offered that since the bank failed to comply with federal rules and regulations, the guarantor commission could not apply for reimbursement from the federal government if it reimbursed the bank.

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[63] Walters v. Grossheim, 554 N.W.2d 530 [113 Educ. L. Rep. 917] (Iowa 1996).

[64] Commercial College of Shreveport v. Williams, 679 So. 2d 509 [112 Educ. L. Rep. 1117] (La. Ct. App. 1996).

[65] United States v. Singer, 943 F. Supp. 9 [114 Educ. L. Rep. 474] (D.D.C. 1996).

[66] LaBate v. National City Corp., 680 N.E.2d 693 [118 Educ. L. Rep. 1150] (Ohio Ct. App. 1996).

[67] Texas Guaranteed Student Loan Corp. v. Ward, 696 So. 2d 930 [119 Educ. L. Rep. 758] (Fla. Dist. Ct. App. 1997).

[68] United States v. Chu, 172 F.D.R. 49 [118 Educ. L. Rep. 1041] (E.D.N.Y. 1997).

[69] New York Higher Educ. Serv. Corp. v. Adams, 660 N.Y.S.2d 824 [121 Educ. L. Rep. 280] (N.Y. Sup. Ct. 1997).

[70] Brannan v. United Student Aid Funds, 94 F.3d 1260 [112 Educ. L. Rep. 26] (9th Cir. 1996).

[71] Nelson v. Diversified Collection Servs., 961 F. Supp. 863 [118 Educ. L. Rep. 307] (D. Md. 1997).

[72] Central La. Bank & Trust Co. v. Lousiana, 688 So.2d 1155 [116 Educ. L. Rep. 1281] (La. Ct. App. 1996).

Child Support

In the first of two cases from Alabama, an appellate court affirmed an order directing a father to pay $700 a month for postminority support even though his daughter had $40,000 available for her college expenses.[73] In the second case, an appellate court reversed in favor of a mother and directed a father to pay postminority educational support. According to the tribunal, the trial court erred when it failed to place academic restrictions on the father's continued obligation to pay, to set a specific amount of support, to decide whether such support imposed an undue hardship, and to place sufficient restrictions on the number of college years or courses for which the father would be responsible.[74]

An appellate court in Missouri observed that a bible college qualified as an institution of vocational or higher education under the law concerning a father's obligation to pay postminority child support.[75] An Indiana appellate court reversed in favor of a mother and pointed out that she could not afford to pay any portion of her daughter's college education.[76] In Iowa, an appellate court affirmed an order requiring one parent to pay college expenses and setting the amount to be paid.[77] An appellate court in New York affirmed that while a physician could be made to pay a pro rata share of his eldest child's college expenses, he had to receive credit toward a reduction of support for his contributions.[78] In Illinois, an appellate court affirmed that a father's obligation under a marriage settlement agreement was subject to an implied term of reasonable price and that he met his burden of proof that the cost of a private college was unreasonable.[79]

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[73] Payne v. Williams, 678 So. 2d 1118 [112 Educ. L. Rep. 1102] (Ala. Civ. App. 1996).

[74] Thompson v. Thompson, 689 So. 2d 885 [117 Educ. L. Rep. 388] (Ala. Civ. App. 1997).

[75] State Div. of Child Support Enforcement v. Gosney, 928 S.W.2d 892 [112 Educ. L. Rep. 1095] (Mo. Ct. App. 1996).

[76] McMaster v. McMaster, 681 N.E.2d 744 [119 Educ. L. Rep. 638] (Ind. Ct. App. 1997).

[77] *In re* Marriage of Wood, 567 N.W.2d 680 [120 Educ. L. Rep. 789] (Iowa Ct. App. 1997).

[78] Vainchenker v. Vainchenker, 662 N.Y.S.2d 545 [121 Educ. L. Rep. 288] (N.Y. App. Div. 1997).

[79] *In re* Marriage of Schmidt, 226 Ill. Dec. 152, 684 N.E.2d 1355 [121 Educ. L. Rep. 811] (Ill. App. Ct. 1997).

Criminal Prosecution

A defendant unsuccessfully challenged his indictment on twelve counts of willfully misapplying federally guaranteed title IV student aid funds. The Supreme Court[80] affirmed the Seventh Circuit's holding[81] that the intent to injure or defraud the government is not an element of willful misapplication of federally guaranteed student aid funds.

Veteran Assistance Benefits

The Federal Circuit Court of Appeals contended that the Secretary of Veterans Affairs incorrectly interpreted an educational assistance law in concluding that officers who received tuition benefits from the Navy were not entitled to retroactive benefits. The court reasoned that the earlier tuition benefits did not make the officers ineligible for aid under the educational assistance statute.[82]

Student Organizations

The Supreme Court of New Hampshire upheld the convictions of a college fraternity for selling alcohol to minors and prostitution.[83] The court also declared that a condition of probation allowing random warrantless searches by a probation officer was constitutional. However, the court added that a similar condition of probation allowing random warrantless searches by a police officer was unconstitutional.

First Amendment

Freedom of Speech

In a case from Minnesota, the Eighth Circuit affirmed that a chancellor was not entitled to qualified immunity when he directed campus police to remove photographs of professors and students who were depicted brandishing weapons from a display case in the history department.[84] The court maintained that a reasonable chancellor should have known that such First Amendment rights were clearly established.

After he was dismissed from a doctoral program in chemistry, a student alleged that faculty members retaliated against his exercise of free speech. A federal district court in Illinois, in denying the defendants' motion to dismiss, believed that a state university cannot punish a student for the content of his speech regardless of whether it touches on matters of private or public concern.[85]

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[80] Bates v. United States, 118 S. Ct. 285 [121 Educ. L. Rep. 483] (U.S. 1997).
[81] United States v. Bates, 96 F.3d 964 [112 Educ. L. Rep. 674] (7th Cir. 1996).
[82] Tallman v. Brown, 105 F.3d 613 [116 Educ. L. Rep. 882] (Fed. Cir. 1997).
[83] State v. Zeta Chi Fraternity, 696 A.2d 530 [119 Educ. L. Rep. 1019] (N.H. 1997).
[84] Burnham v. Ianni, 119 F.3d 668 [120 Educ. L. Rep. 124] (8th Cir. 1997).

An appellate court in Louisiana confirmed a university's authority to remove a student's work from a display on the lawn of the art building.[86] The court agreed that university officials did not violate the student's First Amendment rights because the art work, which was displayed adjacent to a primary school, included obscene expressions and racist expletives.

Where the student managing editor of a publication in Florida projected a sexually explicit video on an exterior wall on a building on campus, university police seized the tape and threatened to arrest her for violating state obscenity laws. Seeking the return of her video and a resolution of the obscenity issue, the student sued in federal court. The court decreed that sending the video tape to the local state attorney general's office for an interpretation of whether it was obscene did not satisfy the constitutional requirement that university officials had to obtain a prompt post-seizure judicial determination.[87]

Freedom of Assembly

A student in the District of Columbia was unable to convince a federal trial court that it had subject matter jurisdiction over his First Amendment claims against college officials.[88] The plaintiff had alleged that officials violated his rights by obstructing and conspiring to interfere with the creation of a student-based student government.

Freedom of Religion

Students at a state university in California unsuccessfully charged that a mandatory registration fee violated their freedom of religion because part of the money supported the school's health insurance program, which covered abortions. The Ninth Circuit affirmed a grant of summary judgment in favor of the university since the students failed to prove that the program imposed a substantial burden on their exercise of religious freedom.[89] The court also emphasized that the university's insurance system was the least restrictive way of furthering its compelling interest in the health and well-being of its students.

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[85] Qvyjt v. Lin, 953 F. Supp. 244 [116 Educ. L. Rep. 601] (N.D. Ill. 1997).

[86] Lahme v. University of Southwestern La., 692 So. 2d. 541 [117 Educ. L. Rep. 1150] (La. Ct. App. 1997).

[87] Andre v. Castor, 963 F. Supp. 1158 [118 Educ. L. Rep. 954] (M.D. Fla. 1997).

[88] Jackson v. Strayer College, 941 F. Supp. 192 [113 Educ. L. Rep. 1191] (D.D.C. 1996).

[89] Goehring v. Brophy, 94 F.3d 1294 [112 Educ. L. Rep. 37] (9th Cir. 1996).

Freedom of Association

Lengthy litigation involving a suit against the State University of New York and the New York Public Interest Research Group (NYPIRG) over student fees finally reached partial resolution. Addressing the reasonableness of an award of attorney fees in favor of the students, the Second Circuit asserted that the university shared liability with the NYPIRG.[90]

The Eleventh Circuit affirmed the unconstitutionality of a statute from Alabama that prohibited colleges or universities from spending public funds to sanction, recognize, or support groups that promote lifestyles or actions banned by sodomy and sexual misconduct laws.[91] The court contended that the statute violated the First Amendment on its face because it allowed the state to engage in viewpoint discrimination. The court added that the state created a limited public forum when it developed a mechanism for funding student groups. As such, the court wrote that the public forum constrained the state's power to regulate speech and association.

An appellate court in California ruled in favor of a state university's ability to collect a mandatory activities fee to support the political activities of the student government.[92] The court ascertained that the First Amendment does not require such activities to be the least constitutionally burdensome means of achieving their stated educational goals. Thus, the court was of the opinion that the educational value of the organization's political activities justified any burden on the constitutional rights of dissenting students.

Discipline

Nonacademic Disciplinary Action

University students in four cases tried to avoid punishments for nonacademic infractions by challenging procedural process. The Supreme Court of Alaska affirmed that displaying threatening conduct toward a professor violated the endangerment provision of the university's student code of conduct.[93] In New York, a student was unable to convince an appellate court to overturn his punishment simply because a disciplinary committee did not record its final vote.[94] In the first of two cases in Pennsylvania, a student who was suspended failed to show that her punishment was improper where university officials allegedly commingled prosecutorial and adjudicatory functions.[95] Another student in Pennsylvania was unable to demonstrate that university officials violated his rights under section 1983[96] and state law when they disciplined him for injuring a university employee with pepper gas.[97]

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[90] Carroll v. Blinken, 105 F.3d 79 [116 Educ. L. Rep. 878] (2d Cir. 1997).

[91] Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 [117 Educ. L. Rep. 462] (11th Cir. 1997).

[92] Smith v. Regents of Univ. of Cal., 65 Cal. Rptr. 2d 813 [119 Educ. L. Rep. 1106] (Cal. Ct. App. 1997).

[93] Szemer v. University of Alaska, 944 P.2d 481 [121 Educ. L. Rep. 333] (Alaska 1997).

Two cases examined double jeopardy in the context of disciplinary action and criminal charges. The Supreme Judicial Court of Maine vacated in favor of a university when it held that the partial revocation of a student's athletic scholarship for assault and disorderly conduct was not punishment for the purposes of double jeopardy.[98] Similarly, an appellate court in Wisconsin decided that the administrative sanction a university imposed on a student who participated in a riot near campus did not bar city officials from prosecuting him under a disorderly conduct ordinance.[99]

Universities and their officials prevailed in both suits where they invoked immunity. In Louisiana, a student who was dismissed from his university for sexual battery, obscenity, and simple assault, alleged that the university and its board of supervisors violated his rights under federal and state laws. The Fifth Circuit affirmed that the defendants were entitled to sovereign immunity.[100] Similarly, a federal court in Virginia found that the faculty and staff at a state veterinary college were protected by qualified immunity when a student challenged her punishment, and ultimate dismissal, for cheating on an examination.[101]

Academic Dismissal

Breach of Contract

A student in Oklahoma filed a breach of contract claim when a university refused to award her degree. An appellate court affirmed a grant of summary judgment in favor of the university.[102] The court acknowledged that the university's refusal to grant the degree where the student did not complete a required internship because two agencies asked for her removal did not constitute arbitrary, capricious, or bad-faith action.

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[94] Willett v. City Univ. of N.Y. Law Sch., 647 N.Y.S.2d 798 [113 Educ. L. Rep. 381] (N.Y. App. Div. 1996).

[95] Jackson v. Indiana Univ. of Pa., 695 A.2d 980 [119 Educ. L. Rep. 536] (Pa. Commw. Ct. 1997).

[96] 42 U.S.C.A. § 1983.

[97] Herbert v. Reinstein, 976 F. Supp. 331 [121 Educ. L. Rep. 727] (E.D. Pa. 1997).

[98] State v. Sterling, 685 A.2d 432 [114 Educ. L. Rep. 878] (Me. 1996).

[99] City of Oshkosh v. Winkler, 557 N.W.2d 464 [115 Educ. L. Rep. 478] Wis. Ct. App. 1996).

[100] Richardson v. Southern Univ., 118 F.3d 450 [119 Educ. L. Rep. 827] (5th Cir. 1997).

[101] Carboni v. Meldrum, 949 F. Supp. 427 [115 Educ. L. Rep. 812] (W.D. Va. 1996).

[102] Clifton-Davis v. State, 930 P.2d 833 [115 Educ. L. Rep. 537] (Okla. Ct. App. 1996).

Similarly, a surgical resident in Connecticut challenged his dismissal for poor clinical performance. In noting that the resident was in an educational, rather than employment, relationship, an appellate court deferred to hospital officials. As such, the court agreed that waiting to dismiss the student in the fourth year of the program did not breach an implied covenant of good faith and fair dealing.[103]

A graduate student in Florida disputed the decision of university officials who refused to approve him for further study toward a doctoral degree. An appellate court affirmed a dismissal in favor of the university on the ground that it enjoyed sovereign immunity to prevent suits in the absence of express written contracts.[104]

In Ohio, a former medical student brought tort and contract claims against the college when he received negative letters of reference from the director of his residency program. Following the lead of cases dealing with academic dismissal, an appellate court affirmed that since the director had not acted with malicious purpose, bad faith, wantonness, or recklessness in his official role, he enjoyed statutory immunity.[105]

Due Process

In a remarkable case from Texas, a federal court directed a university to change a law student's grade from "D" to "pass" in her wills and trusts course and to adjust her class rank from third to first, thereby allowing her to share that honor with the valedictorian. The court ordered this extraordinary remedy because university officials consistently disregarded every aspect of fair procedure, including their own rules and judicial mandates.[106]

A graduate student in Utah challenged his dismissal from a university's graduate programs in psychology on two different occasions. The court granted the university's motion for summary judgment on academic, but not disciplinary, grounds.[107] As to the latter, the court observed that the student raised material issues of fact regarding the denial of due process.

In Ohio, a student sought to compel a university to award him a medical degree after it dismissed him for failure to complete his program of study within the established time limits. A federal district court granted the university's motion for summary judgment since its officials had afforded the student adequate procedural safeguards.[108] Moreover, the court declared that the time restrictions were reasonably related to the student's academic program. Similarly, two courts in New York denied petitions for reinstatement filed by a nursing[109] and a medical[110] student because they would not disturb dismissals for academic deficiencies.

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[103] Gupta v. New Britain Gen. Hosp., 687 A.2d 111 [115 Educ. L. Rep. 961] (Conn. 1996).

[104] Charity v. Board of Regents, 698 So. 2d 907 [120 Educ. L. Rep. 1254] (Fla. Dist. Ct. App. 1997).

[105] Ostasz v. Medical College of Ohio, 683 N.E.2d 352 [120 Educ. L. Rep. 555] (Ohio Ct. App. 1996).

[106] Sylvester v. Texas S. Univ., 957 F. Supp. 944 [117 Educ. L. Rep. 522] (S.D. Tex. 1997).

[107] Roach v. University of Utah, 968 F. Supp. 1446 [119 Educ. L. Rep. 974] (D. Utah 1997).

Racial Discrimination

A medical student in New York failed to establish that he was discriminated against due to his national origin when he was dismissed from the program. An appellate court affirmed that the faculty had properly considered the student's knowledge, clinical skill, and scores on two successive American Urological Association inservice examinations.[111]

Sexual Harassment

A former student in Louisiana challenged an adverse judgment when she claimed that the university was liable for the sexual abuse and psychological trauma that she suffered at the hands of one of her professors. An appellate court affirmed that the trauma suffered by the student was barred by prescription.[112]

Other Constitutional Issues

Privacy

A student athlete in Louisiana who was suspended from intercollegiate competition after testing positive for anabolic steroids unsuccessfully disputed his exclusion. An appellate court indicated that since student athletes have a diminished expectation of privacy, the small compromise he experienced in taking a urine test was outweighed by the significant interest shared by the university and the NCAA.[113]

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[108] Jenkins v. Hutton, 967 F. Supp. 277 [119 Educ. L. Rep. 445] (S.D. Ohio 1997).

[109] Jeudy v. City College of N.Y., 649 N.Y.S.2d 416 [114 Educ. L. Rep. 274] (N.Y. App. Div. 1996).

[110] Illickal v. Roman, 653 N.Y.S.2d 562 [116 Educ. L. Rep. 345] (N.Y. App. Div. 1997).

[111] Moukarzel v. Montefiore Med. Ctr., 652 N.Y.S.2d 281 [115 Educ. L. Rep. 407] (N.Y. App. Div.,1997).

[112] Senn v. Board of Supervisors of La. State Univ., 679 So. 2d 575 [112 Educ. L. Rep. 1121] (La. Ct. App. 1996).

[113] Brennan v. Board of Trustees for Univ. of La. Sys., 691 So. 2d 324 [117 Educ. L. Rep. 803] (La. Ct. App. 1997).

Black students at a public university in New York sued alleging a violation of the Family and Educational Rights Privacy Act (FERPA)[114] after officials released a list of the names and addresses of black students to law enforcement officers who were seeking an armed black male suspect in a violent crime near the campus. The Second Circuit reasoned that due to uncertainty about whether FERPA's emergency exception allowed them to release the list, university officials were entitled to qualified immunity insofar as they did not infringe on any of the students' clearly established rights.[115]

Federal Statutes

Title VI

A third-year African-American medical student sued faculty members for alleged racial discrimination after she was not reappointed. A federal district court in Texas concluded that the student's refusal to accept a remediation plan and her weak surgical skills were legitimate, nondiscriminatory reasons in the denial of her application for reappointment.[116]

Violence Against Women Act

Based on the Violence Against Women Act (VAWA),[117] a former student in Virginia sued university football players who allegedly gang raped her. A federal trial court dismissed the woman's claim since the VAWA was not within the authority of Congress under either the Commerce Clause or the enforcement clause of the Fourteenth Amendment.[118]

Title IX

In a separate action involving the same parties in the previous case from Virginia, the former student sued university officials under title IX.[119] A federal district court dismissed this claim because the woman failed to allege facts to support her contention that the conduct of university officials was based on illegal discriminatory intent.[120]

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[114] 20 U.S.C. § 1232g.

[115] Brown v. City of Oneonta, N.Y., Police Dep't, 106 F.3d 1125 [116 Educ. L. Rep. 98] (2d Cir. 1997).

[116] Baldwin v. University of Tex. Med. Branch at Galveston, 945 F. Supp. 1022 [114 Educ. L. Rep. 846] (S.D. Tex. 1996).

[117] 42 U.S.C. § 13981.

[118] Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 [112 Educ. L. Rep. 846] (W.D. Va. 1996).

[119] 20 U.S.C. § 1681, *et seq.*

[120] Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 772 [112 Educ. L. Rep. 839] (W.D. Va. 1996).

Where a university in Rhode Island demoted the women's gymnastics and volleyball teams from school-funded to donor-supported status, student athletes brought a class action suit against officials for violating of title IX. The First Circuit, in a complicated, multi-issue opinion, ruled that the district court erred in rejecting the university's remedial plan and substituting its own scheme for relief.[121]

A case from New York involved a work-study student who volunteered as an intern at a state mental health facility in order to satisfy part of her degree requirements. The student sued the state and the hospital, claiming violations of title VII and title IX when she was sexually harassed by a doctor. The Second Circuit affirmed that the student's service as an intern did not transform the hospital into an employer under title VII or an educational program under title IX.[122]

In Arkansas, a student sued university officials for their allegedly inadequate response to her complaints of sexual harassment by a professor. The Eighth Circuit affirmed that title IX abrogated the state's Eleventh Amendment immunity from suit and did not contain a sufficiently comprehensive remedial scheme to foreclose the use of section 1983 to redress its violation.[123]

A female student athlete in Alabama sued her university, alleging that its inequitable treatment of women athletes violated title IX. A federal district court held that even though her athletic eligibility had expired, the student was not disqualified from seeking injunctive relief.[124] The court added that since the student's claims fell under the continuing violation doctrine, they were not barred by the statute of limitations.

Disability Laws

Students unsuccessfully sought remedies under Section 504 or the ADA for a variety of reasons related to their alleged disabilities. In Illinois, the Seventh Circuit affirmed that a law school graduate with epilepsy failed to demonstrate that officials created a hostile environment based on his condition in violation of Section 504 or the ADA.[125] In Pennsylvania, a student who was dismissed from a campus police training program failed to establish that he had an impairment under the ADA or Section 504 based on his past psychiatric treatments.[126] Similarly, a student in a physician's assistance program in West Virginia was unable to show that he was entitled to a reasonable accommodation under the ADA or Section 504 for his alleged learning disability or that the accommodations the college offered were not reasonable.[127]

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[121] Cohen v. Brown Univ., 101 F.3d 155 [114 Educ. L. Rep. 394] (1st Cir. 1996).

[122] O'Connor v. Davis, 126 F.3d 112 [121 Educ. L. Rep. 517] (2d Cir. 1997).

[123] Crawford v. Davis, 109 F.3d 1281 [117 Educ. L. Rep. 90] (8th Cir. 1997).

[124] Beasley v. Alabama State Univ., 966 F. Supp. 1117 [119 Educ. L. Rep. 400] (M.D. Ala. 1997).

[125] Rothman v. Emory Univ., 123 F.3d 446 [120 Educ. L. Rep. 984] (7th Cir. 1997).

[126] Gardiner v. Mercyhurst College, 942 F. Supp. 1050 [114 Educ. L. Rep. 157] (W.D. Pa. 1995).

A federal district court in West Virginia found that medical students who were diagnosed as having attention deficit hyperactivity disorder as well as written expression and reading disorders did not have impairments under the ADA. In denying the students' request for more time to take the United States Medical Licensing Examination, the court noted that since they were able to learn as well as or better than the average person in the general population, they failed to show they had impairments that substantially limited a major life activity.[128]

In contrast to situations wherein students sought accommodations for course or program requirements, an athlete in Illinois failed three times when he attempted to stop his university from barring him from intercollegiate basketball because he suffered from ventricular fibrillation. The Seventh Circuit pointed out that the student was neither disabled nor otherwise qualified within the meaning of Section 504.[129]

Students with disabilities did score one victory. In a complex case from Massachusetts, students with attention deficit hyperactivity disorder, attention deficit disorder, and other learning disabilities successfully brought a class action suit against their university. The federal district court determined that university regulations requiring students to be retested every three years only by physicians, clinical psychologists, or licensed psychologists violated the ADA and the Section 504 since they relied on eligibility criteria that tended to screen out students with specific learning disabilities.[130] Further, the court concluded that university officials' refusal to modify degree requirements to provide reasonable course accommodations was motivated in part by uninformed stereotypes about students with learning disabilities.

Fair Housing Act

Nonstudents in Utah alleged discrimination in violation of the Fair Housing Act[131] when a university advertised and rented gender-segregated student apartments. The Tenth Circuit vacated, remanded, and ordered the dismissal of the trial court's decree that the nonstudents had standing.[132] The court added that any stigmatic effect from reading the gender-discriminatory housing advertising did not confer standing on the nonstudents.

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[127] Dubois v. Alderson-Broaddus College, 950 F. Supp. 754 [115 Educ. L. Rep. 912] (N.D. W. Va. 1997).

[128] Price v. National Bd. of Med. Exam'rs, 966 F. Supp. 419 [119 Educ. L. Rep. 390] (S.D. W. Va. 1997).

[129] Knapp v. Northwestern Univ., 938 F. Supp. 508 [113 Educ. L. Rep. 269] (N.D. Ill. 1996); Knapp v. Northwestern Univ., 942 F. Supp. 1191 [114 Educ. L. Rep. 169] (N.D. Ill. 1996); Knapp v. Northwestern Univ., 101 F.3d 473 [114 Educ. L. Rep. 460] (7th Cir. 1996).

[130] Guckenberger v. Boston Univ., 974 F. Supp. 106 [121 Educ. L. Rep. 541] (D. Mass. 1997).

[131] 42 U.S.C. §§ 3601–3631.

National Voter Registration Act

In Virginia, the National Coalition for Students with Disabilities unsuccessfully claimed that the failure of public universities and colleges to provide voting registration services violated the National Voter Registration Act of 1993 (NVRA).[133] A district court asserted that nothing in the NVRA's history or language suggested that colleges or universities had to provide voting registration services.[134] Moreover, the court stated that private persons cannot support a section 1983 claim based upon an alleged violation of the NVRA.

Conclusion

The past year's litigation involving students in higher education suggests that they will continue to challenge the discretionary authority of the faculty and administration. At the same time, the cases reveal that academic officials continue to enjoy protection from judicial interference. Unless educators act in bad faith or fail to follow their own rules and regulations, judges will refuse to substitute their judgment for that of academic officials. Former students will sustain efforts to test the limits of using bankruptcy to dismiss their loan debts. Students and former students will also keep using federal anti-discrimination laws to support their claims.

Institutions, especially proprietary schools seeking to maintain their eligibility, will continue to question the Secretary of Education's interpretation of federal statutes governing financial aid to students. It is also likely that institutions will persist in their attempts to prevent erosion of their authority by outside agencies.

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[132] Wilson v. Glenwood Intermountain Properties, 98 F.3d 590 [113 Educ. L. Rep. 551] (10th Cir. 1996).

[133] 42 U.S.C. §§ 1973gg *et seq.*

[134] National Coalition for Students with Disabilities Educ. & Legal Defense Fund v. Allen, 961 F. Supp. 129 [118 Educ. L. Rep. 279] (E.D. Va. 1997).

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